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No. 89-1821-CFX
Status: GRANTED

Title: Charles Z. Stevens, III, Petitioner
v.
Department of the Treasury, et al.

Docketed:
May 18, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Steiner, Alison

Counsel for respondent: Solicitor General

Ptn recd May 23, 1990 and mailed on May 18, 1990.

Entry	Date	Note	Proceedings and Orders
1	May 18 1990	G	Petition for writ of certiorari filed.
3	Jun 12 1990		Order extending time to file response to petition until July 20, 1990.
4	Jul 20 1990		Brief of respondent United States in opposition filed.
5	Jul 25 1990		DISTRIBUTED. September 24, 1990
7	Oct 15 1990		REDISTRIBUTED. October 26, 1990
9	Oct 29 1990		REDISTRIBUTED. November 2, 1990
10	Nov 5 1990		Petition GRANTED. *****
11	Nov 14 1990		Record filed.
		*	Certified copy of C. A. Proceedings received.
12	Dec 20 1990		Joint appendix filed.
13	Dec 20 1990		Brief of petitioner filed.
14	Jan 28 1991		Brief of respondents Department of the Treasury, et al. filed.
15	Jan 28 1991	G	Motion of the Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice filed.
16	Feb 1 1991		SET FOR ARGUMENT TUESDAY, MARCH 19, 1991. (1ST CASE)
17	Feb 6 1991		CIRCULATED.
18	Feb 19 1991		Motion of the Solicitor General to permit Amy L. Wax, Esq. to present oral argument pro hac vice GRANTED.
19	Feb 25 1991		Record filed.
		*	Certified copy of original record, 2 volumes, received.
20	Mar 1 1991	X	Reply brief of petitioner Charles Z. Stevens filed.
21	Mar 19 1991		ARGUED.

**In the
Supreme Court of the United States**

OCTOBER TERM, 1989

CHARLES Z. STEVENS, III
Petitioner

VS.

UNITED STATES DEPARTMENT
OF THE TREASURY;
NICHOLAS F. BRADY, Secretary,
U. S. DEPARTMENT OF THE TREASURY
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS VIOLATE THE UNAMBIGUOUS LANGUAGE OF THE ADEA AND/OR CONTROLLING PRECEDENT OF THIS COURT IN DECIDING THAT A FEDERAL EMPLOYEE'S TIMELY FILING UNDER 29 U.S.C. § 633a(d) OF A NOTICE OF INTENT TO FILE CIVIL ACTION WAS RENDERED "INEFFECTIVE" AS A PREDICATE FOR ADEA CIVIL ACTION BECAUSE THE CIVIL ACTION WAS INSTITUTED MORE THAN THIRTY DAYS AFTER THE NOTICE?

2. DID THE COURT OF APPEALS ADOPT THE ELECTION/EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT OF *CASTRO V. U.S.*, 775 F.2d 399 (1st Cir. 1985) AND *PURTILL V. HARRIS*, 658 F.2d 134 (3rd Cir. 1981), AND THUS CREATE A CONFLICT WITH THE DECISION IN *LANGFORD V. U.S. ARMY CORPS OF ENGINEERS*, 839 F.2d 1192 (6th Cir. 1985), WHEN IT HELD THAT THE UNTIMELY FILING OF A FEDERAL EMPLOYEE'S INTERNAL AGENCY ADEA COMPLAINT TIME BARRED HIS ADEA CIVIL ACTION, EVEN THOUGH THE EMPLOYEE HAD ALSO TIMELY FILED A NOTICE OF INTENT TO FILE SUIT PURSUANT TO 29 U.S.C. § 633a(d) NOT LESS THAN THIRTY DAYS PRIOR TO INSTITUTING HIS CIVIL ACTION?

RULE 28.1 STATEMENT

Parties to this case are:

Charles Z. Stevens, III, Petitioner

United States Department of the Treasury, Respondent

James A. Baker, III, former Secretary of the Treasury,
Defendant/Appellee below

Nicholas F. Brady, Secretary of the Treasury (successor to
James A. Baker, III as Secretary of the Treasury),
Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 28:1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
I. The Court Of Appeals Holding That The Petitioner's Suit Was Filed Too Long After The Filing Of The Notice Of Intent Is Directly Contrary To The Express Language Of The ADEA And To Established Precedent Of This Court On Statutory Construction	5
II. The Court Of Appeals, In Conflict With Decisions Of Other Circuits, Erroneously Bound Petitioner To An Election And Exhaustion Of Remedies Not Required By The Statute	9
CONCLUSION	14
APPENDIX:	
Appendix A	A-1
Appendix B	A-5
Appendix C	A-9
Appendix D	A-11

TABLE OF AUTHORITIES

CASES	Page
<i>American Tobacco Co. v. Patterson</i> , 456 U.S. 63 (1982)	9
<i>Bob Jones University v. U.S.</i> , 461 U.S. 574 (1983)	9
<i>Brown v. General Services Admn.</i> , 425 U.S. 820 (1976)	10
<i>Castro v. U.S.</i> , 775 F.2d 399 (1st Cir. 1985) 6,11,13	
<i>Escondido Water Co. v. La Jolla Band of Mission Indians</i> , 466 U.S. 765 reh. den. 467 U.S. 1267 (1984)	9
<i>Irwin v. V.A.</i> , 874 F.2d 1092 (5th Cir. 1989)	13
<i>Jefferson County Pharmaceutical Association v. Abbot Laboratories</i> , 460 U.S. 150 reh. den. 460 U.S. 1105 (1983)	9
<i>Langford v. U.S. Army Corps of Engineers</i> , 839 F.2d 1192 (6th Cir. 1985)	11,12,13
<i>Lehman v. Nakshian</i> , 453 U.S. 156 (1972)	7,8,10
<i>Limongelli v. U.S.P.S.</i> , 707 F.2d 368 (9th Cir. 1983)	11
<i>McKinney v. Dole</i> , 765 F.2d 1129 (D.C. Cir. 1985)	6
<i>NLRB v. Amax Coal Co.</i> , 453 U.S. 322 reh den. 453 U.S. 950 (1981)	9
<i>Patterson v. Weinberger</i> , 644 F.2d 521 (5th Cir. 1981)	13
<i>Proud v. U.S.</i> , 872 F.2d 1066 (D.C. Cir. 1989)	10
<i>Purtill v. Harris</i> , 658 F.2d 134 (3rd Cir. 1981) cert filed sub nom <i>Purtill v. Schweiker</i> , 51 U.S.L.W. 3062 (1982), cert den. sub nom <i>Purtill v. Heckler</i> , 462 U.S. 1131 (1983)	11,13,14
<i>Ray v. Nimmo</i> , 704 F.2d 1480 (11th Cir. 1983)	10,11

TABLE OF AUTHORITIES (continued)

	Page
<i>Roman v. Shear</i> , 799 F.2d 1416 (9th Cir. 1986), cert filed 55 U.S.L.W. 3734, cert den. 481 U.S. 1050 (1987)	11,14
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	9
<i>White v. Franks</i> , 718 F. Supp. 592, 595 (W.D. TX 1989)	13
<i>Wiersma v. Tennessee Valley Authority</i> , Civil Action No. 3-85-1160, (Eastern District of Tennessee, March 12, 1986), 41 BNA FEP CAS 1588, 41 CCH EPD Paragraphs 36518, 36519	7
<i>Zipes v. TWA, Inc.</i> , 455 U.S. 385 (1982)	7,10

Other Authorities:

Statutes:

28 U.S.C. § 1254(a)	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343	2
28 U.S.C. § 2401(a)	7
29 U.S.C. § 626	7
29 U.S.C. § 633a	2-13
29 U.S.C. § 255	7
42 U.S.C. § 2000e-16(c)	10,12

TABLE OF AUTHORITIES (continued)

Page

Regulations:

29 Code of Federal Regulations, Part XIV, Chapter 1613

§ 1613.201	3
§ 1613.214	2,3,5
§ 1613.501	2,10,12
§ 1613.511	2,3,5,10,11,12
§ 1613.513	2,5,10,12
§ 1613.514	2,5,10,11,12
§ 1613.521	2,10,11,12

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CHARLES Z. STEVENS, III

PETITIONER

VS.

UNITED STATES DEPARTMENT OF THE
TREASURY, NICHOLAS F. BRADY,
SECRETARY, UNITED STATES
DEPARTMENT OF THE TREASURY

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles Z. Stevens, III, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Charles Z. Stevens, III, v. United States Department of the Treasury, et al.*, No. 89-1432 (February 21, 1990).

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been officially reported. The Memorandum Opinion and Order filed April 19, 1989 in Civil Action A-88-CA-340 appears as Appendix A hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is also unreported. The *per curiam* panel opinion of February 21, 1990 in Case No. 89-1432, Summary Calendar appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

The statutory provisions involved in this Petition are subsections (b), (c) and (d) of § 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a(b) (c) (d). The statutory provisions appear as Appendix C hereto. The federal regulations pertinent to this petition are 29 Code of Federal Regulations, Part XIV, § 1613.214 and §§ 1613. 501-521 (1989). Said regulations appear as Appendix D hereto.

STATEMENT OF THE CASE

Plaintiff/Petitioner brought this civil action in the United States District Court for the Western District of Texas against his employer, the Defendant/Respondent United States Department of the Treasury and its chief Administrator, James A. Baker, III, then Secretary of the Treasury, under the Age Discrimination in Employment Act of 1967 (ADEA) 29 U.S.C. § 633a. Jurisdiction was conferred in the District Court by 29 U.S.C. § 633a(c) and 28 U.S.C. §§ 1331 and 1343.

Petitioners' suit alleged that he had been discriminated against on the basis of his age, sixty-three, when he was forced to withdraw from a Revenue Officer Trainee Program with the Internal Revenue Service and transfer to a lower grade position at the Internal Revenue Service Center. Meanwhile, younger employees with comparable records to his own, Petitioner asserted, were

allowed to either continue in or join the Revenue Officer Trainee Program.

The District Court tried the case on March 29, 1989 and took evidence as to both the merits and the jurisdictional issues on which it ultimately decided the claim. On April 7, 1989, it rendered its Order and Memorandum Opinion (App. A) dismissing Petitioner's complaint for lack of jurisdiction due to what the District Court found to be Petitioner's failure to comply with either the internal administrative filing requirements set forth in 29 U.S.C. § 633a(b) and the regulations promulgated thereunder, 29 CFR § 1613.201 et seq. or the alternative administrative procedures established by § 633a(d). Petitioner made a timely appeal to the United States Court of Appeals for the Fifth Circuit which disposed of the case on its summary calendar, rejecting part of the District Court's reasoning, but affirming the decision and the order of dismissal. (App. B)

The facts relevant to the decisions below are largely undisputed. Petitioner was forced to seek the demotion/transfer which he complains was age discriminatory on or about April 26, 1987. Although he did make some attempts to "grieve" this action by contacting his Congressman, he did not invoke the Department of Treasury internal Administrative grievance procedure until September 24, 1987. (App. A, p.A-2) This date was more than thirty days from the date of the alleged discrimination and his complaint was therefore untimely under the federal regulations governing filing of internal agency age discrimination claims, see 29 U.S.C. § 633a(b) and 29 CFR §§ 1613.214(a)(i); 1613.511. The District Court therefore found that, there being no good cause for the late filing, § 1613.214(a)(4), it had no § 633a(b) jurisdiction over the case.

However, because he had been advised from the start that the Department of Treasury was treating his complaint as having been filed out-of-time, Petitioner also attempted to preserve his right to pursue his claim in court by invoking an alternative administrative procedure set forth in § 633a(d) which bypasses the internal agency procedures. The only prerequisite to pursuing this avenue of relief under the ADEA is that a person file a notice of his intent to file a civil action within 180 days of the alleged discrimination and not *less* than thirty days before institution of a civil action, 29 U.S.C. § 633a(d). As was held by the Court of Appeals (App. B, pp.A-6, A-7) Petitioner filed this notice of intent to file suit on or about October 19, 1987, 176 days from the date of the alleged discrimination. Petitioner's complaint in District Court was then filed on May 4, 1988, more than thirty days after this notice of intent was filed. (App. B, p.A-7)

Nonetheless, both the District Court and the Court of Appeals held that Petitioner's § 633a(d) filing was also flawed as a jurisdictional foundation for the District court action. The District Court's ground for this conclusion, that the suit itself was not instituted within 180 days of the incident (App. A, p.A-3), is clearly based on an incorrect reading of the law. Although the Court of Appeals properly rejected the District Court's incorrect legal rationale, (App. B, p.A-7) the Court of Appeals did not specifically articulate its own rationale. However, Petitioner respectfully submits that any rationale that the Court of Appeals could have relied on in rejecting the Petitioners' claim that § 633a(d) vested jurisdiction in the District Court gives this Court reason to grant a Writ of Certiorari and review the decision.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE COURT OF APPEALS HOLDING THAT THE PETITIONER'S SUIT WAS FILED TOO LONG AFTER THE FILING OF THE NOTICE OF INTENT IS DIRECTLY CONTRARY TO THE EXPRESS LANGUAGE OF THE ADEA AND TO ESTABLISHED PRECEDENT OF THIS COURT ON STATUTORY CONSTRUCTION.

The statutory scheme established by 29 U.S.C. § 633a permits federal employees to protect their right to be free from age discrimination in employment by filing actions in federal district court, 29 U.S.C. § 633a(c), provided only that the employee first complies with one of two alternative administrative prerequisites or predicates to filing such suit. The first alternative, controlled by 29 U.S.C. § 633a(b) and an extensive regulatory scheme set forth at 29 CFR, Chapter SIV, Part 1613, consists of a complex internal agency administrative, investigative and adjudicative process for ascertaining the merits of age discrimination complaints and for resolving them, 29 CFR §§ 1613.214-222; § 1613.511, culminating in an appeal to the EEOC as an appellate and enforcement body, § 1613.521 and ultimately, if the matter is not otherwise satisfactorily resolved, to federal court, § 1613.513. The § 633a(b) procedures must be invoked within thirty days of the alleged discrimination, or the right to employ them is lost, 29 CFR § 1613.214. (App. A, p.A-1).

The second alternative administrative prerequisite to suit, controlled by 29 U.S.C. § 633a(d) allows an employee to bypass the internal agency remedy by filing, within 180 days of the alleged discrimination, a notice of

his intent to file a civil action. (App. B, p.A-7).

Petitioner does not seek to challenge the determination that his efforts under § 633a(b) were untimely. He does, however, submit that this Court should review the decision by the Court below that his § 633a(d) efforts were also an ineffective predicate for his suit.

While enigmatic in several vital respects, the Court of Appeals decision is clear and unambiguous on three basic matters relevant to Petitioner's claim that he should be permitted to maintain this action pursuant to § 633a(d) of the ADEA:

First, the Court of Appeals held expressly that § 633a(d) is the portion of the statute relevant to the Petitioner's claim. (App. B, p.A-6, A-8).

Second, the court of Appeals held expressly that § 633a(d) is complied with by filing notice of intent to sue within 180 days of the act of discrimination complained of, but does not require that the actual suit be filed within that time (App. B, p.A-A-7).¹

Third, the Court of Appeals found that the Petitioner did in fact file the requisite notice of intent to sue on or about October 19, 1987, (App. B, pp. A-6, A-7) which date is within 180 days of April 26, 1987, the date on which Petitioner alleges he was discriminated against.

¹ In holding this, the Court of Appeals reversed the erroneous conclusion of the District Court that § 633a required the actual suit to be filed within 180 days, (App. A, p.A-3). This error of the District Court may have had its origin in *dicta* in *Castro v. U.S.*, 775 F.2d 399, 403 (1st Cir. 1985) and *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985).

Notwithstanding these correct conclusions, however, the Court of Appeals reached the rather startling further conclusion that Petitioner's otherwise timely filing of a notice of intent to file suit was "not effective" as a predicate for the instant civil action because Petitioner "did not initiate the present action in federal court until May 4, 1988." (App. B, p.A-7) This is somewhat puzzling because the date, May 4, 1988, is clearly a date "not less than thirty days", § 633a(d), after the filing of the notice of intent to sue.²

The Court of Appeals does not articulate its rationale for why the May, 4, 1988 suit filing renders the October 19, 1987 notice filing "not effective." However, if it is the

² This date is also well within any statute of limitations which might apply to this action. ADEA actions by non-federal employees, 29 U.S.C. § 626, must be filed within the time provided for under the Portal to Portal Act, 29 U.S.C. § 255 which establishes a two-year statute of limitations for non-wilful violations and three-year statute for wilful violations. This Court has not spoken on whether or not this statute of limitations applies to federal employee ADEA actions, though at least one lower court has assumed that it did, *Wiersma v. Tennessee Valley Authority*, (Civil Action No. 3-85-1160 Eastern District of Tennessee, March 12, 1986), 41 BNA FEP CAS 1588, 41 CCH EPD Paragraphs 36518, 36519. Even if the distinction between federal and non-federal employee actions under the ADEA were to prevent this statute of limitations from applying, see *Lehman v. Nakshian*, 453 U.S. 156 (1972), the only other applicable limitation would be that contained in 28 U.S.C. § 2401(a) which establishes a six year limitation period for initiating actions against the United States. This is, apparently, the statute of limitations the employee manual furnished to Petitioner contemplates (Tr. p.22). A final alternative would be that in not specifically prescribing a statute of limitations under § 633a the Congress was simply setting up a scheme parallel to that under Title VII of the Civil Rights Act of 1964 which prescribes no absolute limitation for the filing of actions under that statute, but simply requires that, unless otherwise excused by equitable modifications, *Zipes v. TWA, Inc.*, 455 U.S. 385 (1982), the administrative procedure be invoked within 180 days. Section 633a(d) simply requires invoking the administrative procedure through notice of intent to file suit within 180 days of the alleged discrimination, something which the Petitioner here did.

seven month time lapse between those two dates, then the Court of Appeals apparently misread the statute and interpreted the provision requiring that suit be filed after giving notice of "not less than thirty days" 29 U.S.C. § 633a(d) (emphasis added) as if it meant that suit must be filed "not more than thirty days" from the notice. Thus, the Court of Appeals apparently construed the statute to mean that the notice was "not effective" because May 4th is more than thirty days from October 19th.³

The clear language of the statute does not support this reading. The statute states specifically that

[no] civil action may be commenced . . . under this section until the individual has given the Commission *not less than thirty days notice of intent to file* [a civil] action, 29 U.S.C. § 633a (d). (emphasis added)

In plain English, this statute says that the Commission must be given a minimum of thirty days notice. It does not, however, prevent a notice longer than thirty days from being effective.

Although this Court has had one occasion to interpret the language of and congressional intent underlying the federal protective provision of the ADEA contained in 29 U.S.C. § 633a, *Lehman v. Nakshian*, 453 U.S. 156 (1972) it does not address the specific language at issue here. However, it is a fundamental tenet of statutory construction that the plain language of a statute establishes the

³. In concluding this, the Court of Appeals may simply have adopted a similar error made by the District Court when the District Court held that under § 633a(d) a complainant is required to "notify the EEOC within thirty days prior to commencing suit" (App. A, p.A-3).

meaning of a statute unless there is an ambiguity of language or express legislative intent to the contrary, *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 157, *reh. den.* 460 U.S. 1105 (1983), *Escondido Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772, *reh. den.* 467 U.S. 1267 (1984), *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), or the circumstances of enactment indicate otherwise, e.g., *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) or reliance on the specific language would defeat the plain purpose of the statute, e.g., *Bob Jones University v. U.S.*, 461 U.S. 574, 586 (1983).

Petitioner submits that there is no basis in the instant case to construe § 633a(d) any way other than as it literally reads: that an ADEA civil action filed at any time thirty days or more after the filing of a notice of intent is timely and that the passage of seven months does not render a otherwise timely notice of intent "not effective" as a predicate to suit. This Court should grant Petitioner's Writ to correct this clear error of law on the part of the Court of Appeals.

ARGUMENT II

THE COURT OF APPEALS, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, ERRONEOUSLY BOUND PETITIONER TO AN ELECTION AND EXHAUSTION OF REMEDIES NOT REQUIRED BY THE STATUTE.

An alternative rationale for the Court of Appeals' conclusion that Petitioner's otherwise timely § 633a(d) notice was not an effective jurisdictional predicate for the instant case lies in a combined election and exhaustion of

remedies theory. Under that theory, the Court of Appeals' affirmance of the dismissal of Petitioner's case rests on an underlying conclusion that Petitioner's attempt to invoke the § 633a(b) internal remedies — even though the effort was untimely and therefore ineffective to him as an avenue of relief — precluded altogether his use of the § 633a(d) notice option as a predicate for his suit.

Petitioner submits that this is contrary to the language and purposes of § 15 (29 U.S.C. § 3a) of the ADEA: to extend to federal employees a substantive right to protection against age discrimination in employment, *Nakshian*, 453 U.S. at 167, and to accord federal employees the right to enforce this protection in the federal courts, 453 U.S. at 162.

Like other anti-discrimination statutory schemes, the ADEA should be liberally construed in order to maximize its remedial purposes and avoid unduly restrictive procedural barriers to access by aggrieved persons to the courts, *Zipes v. TWA, Inc.*, 455 U.S. 385, 395 n.11 (1982), see also *Ray v. Nimmo*, 704 F.2d 1480, 1483-84, (11th Cir. 1983). Congress furthered this effort when it extended the ADEA to federal employees in 1978 by eliminating a procedural barrier which it had previously imposed on federal race and sex discrimination claimants under § 717 of Title VII of the Civil Rights Act: that of requiring exhaustion of internal agency remedies prior to going to court, 42 U.S.C. § 2000e-16(c), *Brown v. General Services Admn.*, 425 U.S. 820 (1976). Instead, when Congress adopted the federal ADEA provisions, it specifically gave federal age discrimination claimants the option of bypassing the agency procedures, 29 U.S.C. § 633a(d), *Proud v. U.S.*, 872 F.2d 1066 (D.C. Cir. 1989). When the Equal Employment Opportunity Commission promulgated regulations covering federal employee age claims, 29 CFR § 1613.501-521, it

incorporated much of the procedural regulatory scheme it had developed under Title VII, §§ 1613.511. However, it specifically excluded all references to requiring final agency action as a predicate for suit under the ADEA, e.g. §§ 1613.514; 1613.521.

Notwithstanding this relatively straightforward statutory scheme, a conflict has developed among the circuits as to whether or not the ADEA means what it says about permitting federal employees to bypass the administrative process, compare *Langford v. U.S. Army Corp. of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir. 1988) with *Castro v. U.S.*, 775 F.2d 399, 404 (1st Cir. 1985), and *Purtill v. Harris*, 658 F.2d 134, 137 (3rd Cir. 1981) *cert. den.*, 462 U.S. 1131 (1983).⁴ With its decision in the instant case, the Fifth Circuit has inserted itself directly into this conflict.

The most recent court to consider this issue at length has been the Sixth Circuit in *Langford*, 839 F.2d at 1194-95, in which it concluded that the law did not require a federal ADEA plaintiff to irretrievably elect between his 633a(b) and 633a(d) remedies. The *Langford* Court allowed the plaintiff to proceed in court on the basis of a § 633a(d) filing even though he had deliberately abandoned § 633a(b) procedures in order to do so. The District Court had dismissed the plaintiff's complaint specifically on the

⁴ The Ninth Circuit has inclined towards the *Purtill* and *Castro* election/exhaustion requirements, see *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986) *cert. den.*, 481 U.S. 1050 (1987), *Limongelli v. U.S.P.S.*, 707 F.2d 368, 373 (9th Cir. 1983). Unlike *Langford*, *Castro*, and *Purtill*, however, the Ninth Circuit cases did not require disposition on this issue to arrive at the outcome and therefore did not address the issue in depth. The Eleventh Circuit, in *Ray v. Nimmo*, 704 F.2d at 1484-85, n.12, acknowledges the existence of the election/exhaustion issue and, though apparently inclined towards the *Langford* position, declined to directly address the issue as it was not necessary for disposition of the case.

grounds that once the § 633a(b) internal agency route had been elected by the plaintiff it could not be abandoned in favor of a § 633a(d) direct one, *Langford*, 839 F.2d at 1194.

The Sixth Circuit Court of Appeals, however, reversed and held that:

Unlike the Civil Rights Act which generally requires exhaustion of administrative remedies before a government employee ... may file a civil action, see 42 U.S.C. § 2000e-16(c), the ADEA provides two separate avenues of relief to a federal employee ... who believes that he has been a victim of age discrimination...(:)

* * *

He may file an administrative complaint with the employing federal agency and if the employing agency's determination is adverse to him, he may appeal to the [EEOC] for administrative review, 29 U.S.C. § 633a(b), see 29 C.F.R. §§ 1613.501 - 1613.521 (1980). After the administrative complaint has been filed with the commission, a civil action may then be instituted. 29 U.S.C. §§ 633a(c),(d). Alternatively, the employee has the option under the Act to bypass the administrative process *either in part or in its entirety* and proceed directly to federal court thirty days *after* notice of intent to sue has been given to the [EEOC] as long as such notice is given 'within 180 days after the alleged unlawful practice occurred'. 29 U.S.C. § 633a(d) ... (emphasis added)(citations omitted) 839 F.2d at 1194-95.

The Sixth Circuit relies on the statutory language and EEOC regulations in finding that Congress' decision to allow ADEA claimants direct access to the Courts over-

rode any policy arguments for encouraging administrative resolution of claims before permitting access to Court. Ironically, it derived much of its rationale from the case of *Patterson v. Weinberger*, 644 F.2d 521, 523-525 (5th Cir. 1981), a decision which the Fifth Circuit panel in the instant case does not even refer to, and which is apparently no longer considered binding law by the Courts in the Fifth Circuit.⁵

As the *Langford* Court acknowledges, its interpretation that § 633a permits an employee to pursue § 633a(d) efforts even after attempting to invoke § 633a(b) procedures is directly at odds with decisions in the Third and First Circuits, *Purtill*, 658 F.2d 134, *Castro*, 775 F.2d 399. These cases hold that encouraging administrative resolution of federal employee age discrimination claims is more important under the statutory scheme than permitting direct access by these claimants to federal court. They therefore hold that federal employees, once they attempt to invoke the internal administrative process, are irrevocably bound to it and may not invoke any other method of dispute resolution.

Petitioner, of course, submits that the *Langford* position is the better one. However, for purposes of this Petition, Petitioner merely urges that this Court recognize the

⁵ Although the Fifth Circuit recently cited *Patterson* with approval, *Irwin v. V.A.*, 874 F.2d 1092, 1096, n.25 (5th Cir. 1989) § 633a(d) jurisdiction was rejected in that case not because 633a(b) procedures had been invoked, but because the notice the plaintiff relied on as a § 633a(d) notice did not mention the age claim. The only reported case in the Fifth Circuit addressing the viability of *Patterson* in the present context, other than the instant case, is a decision of the same District Court which expressly rejects the argument that *Patterson* mandates a *Langford* approach, and instead adopts the *Purtill* and *Castro* decisions as "more persuasive." *White v. Franks*, 718 F.Supp. 592, 595 (W.D. Tx 1989).

irreconcilable conflict among the circuits on this important question of law and requests that certiorari be granted to resolve it.⁶

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted; the Writ should issue to the United States Court of Appeals for the Fifth Circuit, and his case should thereby be reviewed.

Respectfully submitted,
CHARLES Z. STEVENS, III

By: /s/ Alison Steiner
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⁶ Although certiorari was sought and denied in both *Romain v. SHear*, 481 U.S. 1050, and *Purtill v. Harris*, 462 U.S. 1131, neither petition sought review of the election/exhaustion question, see *Romain v. Shear*, 55 U.S.L.W. 3734 (1987), *Purtill v. Schweiker*, 51 U.S.L.W. 3062 (1982).

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FILED
APR 7 1989

CHARLES STEVENS

V.

A-88-CA-340

U.S. TREASURY DEPARTMENT

ORDER AND MEMORANDUM OPINION

BEFORE THIS COURT on March 29, 1989 came the parties for trial on Plaintiff's claim that he was terminated by the U.S. Treasury Department in violation of the Age Discrimination in Employment Act. On agreement of the parties the cause was tried without a jury. Defendant, from the outset, claimed that the Court lacks jurisdiction over this matter because Plaintiff failed to contact an agency Equal Employment Opportunity Counselor within 30 days of the alleged discriminatory act as required by 29 C.F.R. Sec. 1613.214(a) and 29 U.S.C. Sec. 633a(b). The Court heard testimony on the jurisdictional issues as well as the merits of Plaintiff's ADEA claim. Upon review of the evidence and arguments of counsel, the Court is of the opinion that the jurisdictional issue is dispositive of the case. The Court will not reach the merits of Plaintiff's claim.¹

¹ The Court notes that the parties were ably represented by counsel. Though this cause will be dismissed on jurisdictional grounds, the Record demonstrates that during the period relevant to 29 C.F.R. Sec. 1613.214(a), counsel had not been contacted by the Plaintiff.

Findings of Fact

Charles Z. Stevens was employed at the Austin Service Center, Internal Revenue Service, from January 1985 to August 16, 1986 at the Government Service grade 6 level. On August 17, 1986, Stevens became a Revenue Officer in Training at the grade 7 level. During the probationary period of his employment, on April 26, 1987, Stevens was asked to resign from the Revenue Officer Training program and returned at lower rank to a Tax Examining Assistant position. This is the employment decision from which Stevens seeks redress under the Age Discrimination in Employment Act.

The Court finds that during the Revenue Officer Orientation Training from August 17, 1986 to August 21, 1986 Stevens was instructed about the Equal Employment Opportunity filing procedures. Though it is unclear whether Stevens affirmatively stated to superiors that he believed that his age was used as an impermissible criteria in the employment decision, on a date no later than May 21, 1987, in a letter to his Congressman, Stevens determined that age was a determining factor in the employment decision of April 26, 1987.

On September 24, 1987 Stevens requested an interview with an EEO Counselor and on September 29, 1987 accomplished the interview. On October 19, 1987, Stevens filed a complaint with the Department of Treasury alleging discrimination in violation of the ADEA in the decision of April 26, 1987.

The Court finds that at Plaintiff's work locations EEO notices were prominent and that EEO materials were given to Plaintiff. Stevens was given substantial and adequate notice of the limitations requirements for bringing an

EEO complaint.

Plaintiff has not demonstrated equitable grounds to toll the running of the 30 day limitations.

Conclusions of Law

Under the Age Discrimination Employment Act, 29 U.S.C. Sec. 633a, an employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA. The employee may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit. 29 U.S.C. Sec. 633a(d). In the alternative, the employee may file an administrative complaint with the employing federal agency and appeal an adverse finding to the Equal Employment Opportunity Commission. Under this second procedure, an unsatisfied employee may bring a federal civil action only after exhausting his administrative remedies. 29 U.S.C. Sec. 633a(b).

Because Stevens did not timely bring an EEO grievance, he must demonstrate that he was not aware of the applicable EEO administrative procedures or that there are circumstances which entitle him to an equitable tolling in the commencement of the running of the 30 day time period. 29 C.F.R. Sec. 1613, 214(a)(4); *Oaxca v. Roscoe*, 641 F.2d 386, 391 (1981).

Plaintiff failed to demonstrate equitable grounds to toll the commencement of the running of the 30 day time period prior to filing with the EEO. There is no evidence in the Record other than Plaintiff's statement that he did not see the EEO notices to support a finding that he was not informed of the filing requirement. As alternate grounds

A-4

for the delay, Plaintiff states that his letter to a United States Representative supports a finding that Plaintiff pursued other grounds to seek redress. However, the EEO guidelines state with specificity the correct steps an employee must take to invoke the protection of federal law from employment discrimination. Though contacting a Congressman may be effective, it does not preserve the EEO and civil litigation remedy. There are insufficient grounds to support an equitable tolling of the limitations period.

FOR THE FOREGOING REASONS, this Court is without jurisdiction to apply Age Discrimination Employment Act to the circumstances of Stevens' demotion in April, 1987.

IT IS ORDERED that the above-numbered cause is dismissed with prejudice. Cost are assigned to the party incurring them.

SIGNED AND ENTERED, this, the 5th day of April, 1989.

/s/ Lucius D. Bunton

Lucuis D. Bunton
Chief Judge

A-5

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 89-1432
Summary Calendar

CHARLES Z. STEVENS III,
Plaintiff-Appellant,

versus

UNITED STATES DEPARTMENT
OF THE TREASUREY, et al.,
Defendants-Appellees

From the United States District Court
for the Western District of Texas
(A 88 CA 340)

(February 21, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit
Judges.

PER CURIAM:*

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This is an appeal from the district court's dismissal of Charles Z. Stevens III ("Stevens") action against the United States, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 et seq. Stevens argues that the district court erred in finding that Stevens failed to file a complaint with the Equal Employment Opportunity Commission ("EEOC") in a timely manner.

I. Facts and Procedural History

The facts are not in dispute. Stevens was employed at the Austin Service Center of the Internal Revenue Service, from January 1985 to August 16, 1986. On August 17, 1986 Stevens became a Revenue Officer in Training at the grade seven level. During the probationary period of his employment, Stevens was asked to resign from the training program and he was returned to his previous rank on April 26, 1987.

On September 24, 1987 Stevens requested an interview with an EEO Counselor, and received an interview on September 29, 1987. Stevens did not file a complaint or a notice of an intent to file a civil action with the EEOC until October 19, 1987. The district court determined that this was not timely. This Court affirms.

II. Holding and Reasons

The district court cited section 633a(d) of the ADEA to support its decision that Stevens did not file a timely complaint with the EEOC. The district court explained the law as follows:

[A]n employee who believes he has been discriminated against has two avenues of relief under the ADEA. The employee may proceed directly to federal court and *initiate an action no*

later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit, * * * In the alternative, the employee may file an administrative complaint with the employing federal agency and appeal an adverse finding to the [EEOC]. Record Excerpt p. 5 (emphasis added).

The relevant portion of section 633a(d) states:

[n]o civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file [a civil] action. *Such notice shall be filed [with the EEOC] within one hundred and eighty days* after the alleged unlawful practice occurred. (emphasis added).

Contrary to what the district court stated, Stevens had to file a notice of intent to sue with the EEOC within 180 days of the alleged discriminatory action. Stevens did not have to initiate his federal action within 180 days of the alleged action, but merely give notice to the EEOC of his intention to initiate a civil action. Stevens stated at the bottom of his complaint of October 19, 1987 that his complaint would also serve as notice of Stevens' intention to file a civil claim. However, Stevens did not initiate the present action in federal court until May 4, 1988, therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective.

Stevens' contention that sections of the Code of Federal Regulations indicate that the district court erred, is without merit. The sections cited by Stevens do not apply to federal employees.

III. CONCLUSION

Although the district court did not state the applicable law correctly, ultimately the correct result was reached since Stevens failed to meet the requirements set forth in 29 U.S.C. 633a(d).

AFFIRMED

APPENDIX C

29 U.S.C. § 633a provides in pertinent part:

(b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

- (1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semianual basis) progress reports from each department, agency, or unit referred to in subsection (a);
- (2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and
- (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this

section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

APPENDIX D

29 CFR ch. XIV, Part 1613 provides in pertinent part:

§ 1613.214 Filing and processing of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in §1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b) *Representation and official time.* (1) At the stage in the processing of a complaint, including the counseling stage under §1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his/her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the commission

during the investigation, informal adjustment, or hearing on the complaint.

(3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

Subpart E—Nondiscrimination on Account of Age

GENERAL PROVISIONS

§ 1613.501 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age and the regulations under which an agency will process complaints of discrimination on account of age.

(b) *Applicability.* (1) this subpart applies (i) to military departments as defined in section 102 of title 5, United States Code, and Executive agencies as defined in section 105 of title 5, United States Code, the United States Postal Service and the Postal Rate Commission, and to the employees thereof, including employees paid from non-appropriated funds, and (ii) to those units of the legislative and judicial branches of the Federal Government and the Government of the District of Columbia having positions in the competitive service and to the employees of those positions. (2) This subpart does not apply to aliens employed outside the limits of the United States. (3) Except as provided by paragraph (b)(2) of this section, this subpart applies to applicants for positions to which paragraph (b)(1) of this section applies. (4) This

subpart applies to employees and applicants for employment who are at least 40 years of age.

(c) *Exceptions.* Reasonable exemptions to the provisions of this subpart may be established by the Commission for each position for which the Commission establishes a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

§ 1613.502 General Policy.

It is policy of the Government of the United States (and of the government of the District of Columbia) to prohibit discrimination in employment on account of age to assure that all personnel actions affecting employees or applicants for employment are free from discrimination on account of age.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.511 General.

An Agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 1613.514, comply with the principles and requirements in §§ 1613.213 through 1613.222, 1613.241 and 1613.261 through 1613.271 of this part.

§ 1613.512 Coverage.

The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with the agency who believes

that he or she has been discriminated against on-account of age and who, at the time of the action complained of, was an employee or applicant for employment at least 40 years of age. A complaint may also be filed by an organization for the person with his or her consent.

§ 1613.513 Effect on Administrative Processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

§ 1613.514 Exclusions.

Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to § 1613.281 in §§ 1613.215, 1613.217, 1613.220, and 1613.221 may not be included in agency regulations required by this subpart.

§ 1613.521. Appeal to the Commission.

Except for the requirements in § 1613.234 that the decision of the Office of Review and Appeals contain a notice of the right to file a civil action in accordance with § 1613.282, §§ 1613.231 through 1613.240 of this part shall apply to this subpart.

(2)
No. 89-1821

Supreme Court, U.S.

FILED

JUL 20 1990

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES Z. STEVENS, III, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the timely filing of a notice of intent to sue is sufficient to preserve district court jurisdiction under Section 633a(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, even after a claim for administrative relief under Section 633a(b) has been properly dismissed as untimely.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970)	5
<i>Castro v. Unites States</i> , 775 F.2d 399 (1st Cir. 1985)	7
<i>Langford v. U.S. Army Corps of Engineers</i> , 839 F.2d 1192 (6th Cir. 1988)	7
<i>Purcell v. Harris</i> , 658 F.2d 134 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983)	8
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	5

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 <i>et seq.</i>	1
29 U.S.C. 633a(b)	2
29 U.S.C. 633a(d)	3, 4, 5, 6, 7, 8
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	4
29 C.F.R.:	
Section 1613.213	2
Section 1613.213(a)	2
Section 1613.214	2, 4
Section 1613.214(a)(i)	2
Section 1613.214(a)(4)	2
Section 1613.215	2, 4
Section 1613.231	2
Section 1613.513	2, 8
Section 1626.7(a)	6

In the Supreme Court of the United States

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DEPARTMENT OF THE TREASURY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A5-A8) is unreported. The decision of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, provides two separate routes by which a federal employee who is at least

40 years of age and believes he has been discriminated against because of his age can obtain relief. First, the employee may file an administrative claim in accordance with rules and regulations promulgated by the Equal Employment Opportunity Commission (EEOC) and the employing agency. 29 U.S.C. 633a(b). The employee following this route first seeks counseling from an Equal Employment Opportunity counselor at the employing agency. 29 C.F.R. 1613.213. The counseling must be sought within 30 calendar days of the alleged discriminatory event, the effective date of the allegedly discriminatory personnel action, or the date that the employee knew or reasonably should have known of the discriminatory event or personnel action. 29 C.F.R. 1613.214(a)(i). If the matter cannot be resolved to the employee's satisfaction, he must be advised in writing that he has the right to file a formal complaint with the agency. 29 C.F.R. 1613.213(a). That complaint must be filed within 15 calendar days after the employee receives notice of his right to file such a complaint. 29 C.F.R. 1619.214.¹

If the agency denies the complaint, the employee may then appeal to the EEOC. 29 C.F.R. 1613.215; 29 C.F.R. 1613.231. The notice of appeal must be filed within 20 calendar days after receipt of the agency's notice of final decision. After the administrative complaint is filed with the EEOC, the employee may at any time decide that he

¹ The agency shall extend the time limits for seeking counseling or filing a complaint if the aggrieved person shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; the time limits may also be extended for other reasons considered sufficient by the agency. 29 C.F.R. 1613.214(a)(4).

wishes to abandon the administrative process in favor of a civil suit. The filing of a civil action automatically terminates the processing of the administrative complaint. 29 C.F.R. 1613.513.

Alternatively, the employee may bring a civil action in any federal district court of competent jurisdiction without pursuing his administrative remedies at all. The ADEA provides that "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice." 29 U.S.C. 633a(d).

2. Petitioner was employed by the Internal Revenue Service until August 16, 1986, at the GS-6 grade level. On August 17, 1986, he became a GS-7 Revenue Officer in Training. On April 26, 1987, while still in the probationary period, petitioner was asked to resign from the Revenue Officer training program; he returned to his previous grade level. On May 21, 1987, petitioner wrote a letter to his Congressman in which he stated his belief that age had been a determining factor in the request that he resign from the training program (Pet. App. A2, A6), but he did not request an interview with an EEO counselor until September 24, 1987, more than 30 days after the resignation request. An interview was held five days later.

On October 19, 1987, petitioner filed a complaint with the Treasury Department, his employing agency, alleging that the April 26, 1987, employment decision involved discrimination in violation of the ADEA. Pet. App. A2, A6. At the bottom of that complaint, petitioner stated that "[t]his is also my notice of intent to sue in U.S. Civil District Court if the matter is not satisfactorily resolved." CX 4.

On December 3, 1987, the agency rejected the complaint as untimely. CX 2. It recognized that although 29 C.F.R. 1613.215 requires a complainant to contact an EEO counselor within 30 days of the allegedly discriminatory action, that time limit may be extended if the complainant demonstrates good cause to do so. *Ibid.*; 29 C.F.R. 1613.214. The agency concluded, however, that petitioner had not provided adequate justification for his failure to contact an EEO counselor until 151 days after the allegedly discriminatory action had occurred. CX 2.

Petitioner thereupon appealed to the EEOC, which affirmed the agency's decision in an order dated March 30, 1988. CX 1. It found that, although petitioner was aware of the alleged discrimination at least by May 21, 1987 (the date of his letter to his Congressman), he failed to seek counseling until September 24, 1987—well beyond the 30-day time limit. The EEOC agreed with respondent that petitioner had not offered adequate justification for extending the time limit.

3. On May 4, 1988, petitioner filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the ADEA. Pet. App. A5-A7. The Department of the Treasury and James M. Baker, III, the Secretary of the Treasury, were named as defendants. Petitioner alleged that “[b]ecause of [petitioner’s] age of 63 years, Defendants failed to promote [petitioner] and forced [petitioner] to request reduction to a lower grade of employment under threat of dismissal from employment.” Compl. para. 8. Petitioner did not assert jurisdiction based on Section 633a(d) of the ADEA.

After a bench trial, the district court issued an order dismissing the case with prejudice for lack of jurisdiction. Pet. App. A1-A4. Although the court recognized that, under the ADEA, a person who believes that he has been discriminated against on the basis of age has two avenues

of relief, it apparently assumed that petitioner’s failure to initiate a judicial action within 180 days of the alleged discriminatory action foreclosed his use of the direct judicial review route. Pet. App. A3. It ruled that the EEOC had properly rejected petitioner’s administrative claim, because petitioner had not initiated his EEO grievance by seeking counseling within the required 30-day period, nor had he identified sufficient equitable grounds to justify tolling the running of that period. Pet. App. A3-A4.

4. The court of appeals affirmed, but with a different rationale. It correctly observed that the 180-day time limit of 29 U.S.C. 633a(d) applies to the filing of a notice of intent to sue with the EEOC—not the filing of a civil suit, as the district court believed. Pet. App. A6-A7. The court then found that the statement at the bottom of petitioner’s October 19, 1987, complaint to his employing agency could serve as timely notice to the EEOC. The court nevertheless held that the notice was not “effective” because petitioner did not file his law suit until May 4, 1988. Pet. App. A7.

ARGUMENT

1. Petitioner contends for the first time in this Court that, although he did not timely pursue his administrative remedies, the district court had jurisdiction over his claim because he complied with 29 U.S.C. 633a(d) by filing a timely notice of intent to sue with EEOC. This Court does not ordinarily address questions that have not been properly presented to the courts below. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason to depart from that practice here.

Petitioner’s complaint portrayed the case as simply an appeal from an unfavorable EEOC decision.² It did not

² For example, he alleged that he “did not know of the procedures or a rule that required a charge to be lodged with an EEO Counselor

assert Section 633a(d)'s "notice of intent to sue" provision as the jurisdictional basis for the suit; indeed, it did not even refer to the "notice" contained in petitioner's administrative complaint of October 19, 1987.³ In these circumstances, the district court naturally focussed on the administrative record and properly concluded that petitioner had not timely pursued his administrative remedies.

Petitioner similarly failed to advise the court of appeals of the theory he now advances. In that court, petitioner argued that the "appropriate analysis for jurisdiction of this case" should be based on 29 C.F.R. 1626.7(a), which provides that "[c]harges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in [S]ection 6 of the Portal to Portal Act of 1947." Pet. C.A. Br. 3. The court properly rejected this argument, observing that the regulations petitioner relied upon do not apply to federal employees. Pet. App. A7.

Nevertheless, the court of appeals apparently did treat the case as though it had been brought pursuant to a notice of intent to sue. See Pet. App. A6-A7. It recognized that the October 19, 1987, statement could constitute the timely notice required by Section 633a(d),⁴ but then con-

within 30 days of an occurrence of age discrimination, and in fact, did not know at the time of the wrongful action that it was due to [petitioner's] age." Compl. para. 8. That allegation strongly suggests petitioner was challenging the administrative denial of his complaint, rather than relying on his notice of intent as an independent predicate for his lawsuit: the allegation was completely irrelevant to the latter approach.

³ The administrative complaint was, however, attached to the judicial complaint.

⁴ Section 633a(d) states that notice is to be given to the EEOC, and petitioner's notice is contained in his formal complaint to his employing agency. Nevertheless, EEOC treats such technically deficient notices as sufficient to satisfy the statutory notice requirement.

cluded that because the civil action was not instituted until almost seven months later, the notice "was not effective." Pet. App. A7.

The court of appeals did not explain that conclusion, nor did petitioner seek clarification by filing a petition for rehearing. In these circumstances — and particularly when petitioner did not present the Section 633a(d) argument to the court (the provision was not even cited in petitioner's court of appeals brief) — we submit that there is no need for this Court to accept petitioner's invitation to clarify or correct the cryptic comment in the court of appeals' unpublished opinion.

2. We do, however, agree that the court of appeals appears to have misapprehended the statutory provision relating to direct judicial review. Perhaps — like the district court (Pet. App. A3) — the court of appeals simply misread Section 633a(d), which requires that the notice be given *not less than* 30 days prior to bringing suit, and mistakenly believed that a notice of intent to sue must be given *within* 30 days of bringing suit. The notice in this case clearly complied with the 30-day requirement in Section 633a(d).

It is also possible, as petitioner now suggests (Pet. 9-14), that the court of appeals assumed that the October 19 notice was ineffective because petitioner's decision to seek administrative relief precluded him from pursuing the alternative route of direct judicial review. As petitioner asserts, the courts of appeals are divided as to whether an ADEA complainant who has elected the administrative remedy scheme can nevertheless seek judicial review under Section 633a(d) without completing the administrative process. Compare *Langford v. U.S. Army Corps of Engineers*, 839 F.2d 1192 (6th Cir. 1988) (claimant who seeks administrative remedies does not need to exhaust those remedies prior to bringing suit) with *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985) (claimant, having

started administrative process, must complete it); *Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981) (same), cert. denied, 462 U.S. 1131 (1983).⁵

We do not, however, believe that this case involves that conflict, since petitioner *has* exhausted his administrative remedies; he obtained a final EEOC determination (albeit not on the merits) before he filed his complaint. The issue here is instead the somewhat different one of whether the election of administrative remedies precludes any subsequent resort to judicial relief under Section 633a(d).⁶ Petitioner points to no conflict on that issue.

The cryptic comment of the court of appeals is not, in any event, reliable evidence that it actually addressed this issue, which, after all, was not presented to it. Because the issue was not properly presented below it may not be raised for the first time in a petition for certiorari, and the petition should be denied. Alternatively, the Court may wish to permit the court of appeals to consider that question now. In that event, this case could be remanded to the court of appeals for consideration of whether petitioner's timely filing of a notice of intent to sue not less than 30 days before instituting a civil action against his federal employer was sufficient to preserve the district court's jurisdiction over his underlying age discrimination claim, even though his efforts to obtain administrative relief were properly dismissed as untimely.

⁵ EEOC regulation 29 C.F.R. 1613.513 is consistent with the position adopted in *Langford*. It provides that "[t]he filing of a civil action by an employee or applicant involving [an ADEA administrative] complaint . . . terminates processing of that complaint." That regulation assumes that a judicial complaint may properly be filed before the administrative process is complete.

⁶ We do not, however, suggest that the *Langford* analysis is inapplicable in this slightly different situation.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR

Solicitor General

STUART M. GERSON

Assistant Attorney General

MICHAEL JAY SINGER

MARY K. DOYLE

Attorneys

JULY 1990

(3)
No. 89-1821

Supreme Court, U.S.

FILED

DEC 20 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

CHARLES Z. STEVENS, III,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE TREASURY,
NICHOLAS F. BRADY, SECRETARY,
U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

ALISON STEINER*
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Hattiesburg, Mississippi
39401
(601) 544-8291

Counsel for Petitioner

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Solicitor General
Department of Justice
Washington, D.C. 20537
(202) 514-2217

Counsel for Respondent

**Counsel of Record*

PETITION FOR CERTIORARI FILED MAY 18, 1990
CERTIORARI GRANTED NOVEMBER 5, 1990

TABLE OF CONTENTS*

1. Relevant Docket Entries in the district court ...	1
2. Relevant Docket Entries in the court of appeals...	1
3. Civil Complaint, <i>Charles V. Stevens, III v. U.S. Department of the Treasury and James A. Baker, III, Secretary, U.S. Department of the Treasury</i> , C.A. No. A-88-CA-340, Western District of Texas, Austin Division, filed May 3, 1988	2
4. Exhibit to Complaint: Letter from Petitioner Charles Z. Stevens to Congressman J.J. Pickle, dated May 21, 1987.....	8
5. Exhibit to Complaint: Individual Complaint of Discrimination and Notice of Intent to Institute Civil Action, dated October 19, 1987	11
6. Exhibit to Complaint: Decision of Regional Complaints Center, Department of the Treasury, dated December 3, 1987.....	16
7. Exhibit to Complaint: Decision of Equal Employment Opportunity Commission, Office of Review and Appeals, dated March 30, 1988	20
8. Transcript Excerpts: Argument on Defendant's Rule 41(b) Motion to Dismiss	22
9. Order of the Supreme Court granting certiorari...	24

*Pursuant to Rule 26.1, the following items which appear in the Appendix to the Petition for Writ of Certiorari are not reproduced here:

Opinion of the United States Supreme Court of Appeals, Fifth Circuit, Case No. 89-1432, Feb. 21, 1990.....Pet. App. pp. A-5 - A-8

Memorandum Opinion and Order of the United States District Court for the Western District of Texas, April 7, 1989

DOCKET ENTRIES

**STEVENS V. UNITED STATES
TREASURY DEPARTMENT**

**UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS**

5/3/88 Complaint filed and 4 summons(es) issued

12/30/88 Order granting motion for permission for Darwin McKee to appear as attorney of record for plaintiff

3/29/89 Bench trial begun

3/29/89 Bench trial concluded

4/7/89 Order, dismissing with prejudice. This Court is without jurisdiction to apply the Age Discrimination Employment Act to the Circumstances of Stevens' demotion in April, 1987. Costs are assigned to the party incurring them. [Entry date 04/10/89]

5/10/89 Notice of appeal by Charles Z. Stevens III from the final judgment entered in this cause on the 10th day of April, 1989

3/19/90 Certified copy of memorandum opinion and judgment of USCA affirming the district court

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT**

May 10, 1989 Notice of Appeal Filed

February 21, 1990 Opinion Rendered, SDJ Affirmed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Charles Z. Stevens, III
100 Ridgeway
P.O. Box 1722
San Marcos, Hays, TX 78667

Plaintiff

v.

U.S. Department of the Treasury;
James A. Baker, III, Secretary,
U.S. Department of the Treasury

Defendants

Civil Action No.

A 88 CA 340

COMPLAINT UNDER TITLE VII OF THE CIVIL RIGHTS
ACT OF 1964 AND THE AGE DISCRIMINATION
IN EMPLOYMENT ACT OF 1967, AS AMENDED

(Filed May 3, 1988)

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964 for employment and the Age Discrimination in Employment Act of 1967, as amended. Jurisdiction is conferred on the Court by 42 U.S.C. § 2000 *et seq.* Equitable and other relief are also sought under 42 U.S.C. § 2000e *et seq.*, 29 U.S.C. § 633a *et seq.*, and 29 C.F.R. Sec. 1626.7.
2. Plaintiff. Charles Z. Stevens, III, 100 Ridgeway, P.O. Box 1722, San Marcos, Hays, Texas 78667.
3. Defendants. The parties being sued are:
 - (a) U.S. Department of the Treasury, its business is located at 15th & Pennsylvania Avenue N.W., Washington, D.C. 20220; and
 - (b) James A. Baker, III, in his official capacity, his business is located at Office of the Secretary, U.S. Department of the Treasury, 15th & Pennsylvania Avenue N.W., Washington, D.C. 20220.

4. Plaintiff was employed as a Revenue Officer Trainee, GS-7 by the Defendants at the Internal Revenue Service, Austin District Office, 300 East 8th, Austin, Travis, Austin, Texas.
5. Defendants discriminated against Plaintiff in the manner indicated in paragraph 8 of this complaint on or about 23 March, 1987.
6. Plaintiff filed charges against the Defendants with the Equal Employment Opportunity Commission charging the Defendants with the acts of discrimination indicated in paragraph 8 of this complaint on or about 24 September, 1987 after facts and circumstances revealed the reasons given by the Defendants was willfully used to conceal the fact of age discrimination.
7. The Equal Employment Opportunity Commission issued a notice of right to file a civil action which was received by Plaintiff on 4 April 1988, a copy of which notice is attached to this complaint.
8. Because of Plaintiff's age of 63 years, Defendants failed to promote Plaintiff and forced Plaintiff to request reduction to a lower grade of employment under threat of dismissal from employment.

Plaintiff did not know of the procedures or a rule that required a charge to be lodged with an EEO Counselor within 30 days of an occurrence of age discrimination, and in fact, did not know at the time of the wrongful action that it was due to Plaintiff's age.

9. The circumstances under which Defendants discriminated against Plaintiff were as follows:

Plaintiff was the oldest in the group of trainees at age 63, and younger equally qualified or less qualified persons were retained and promoted, while some of this group were promoted to higher grade before the end of the probationary period.

The Plaintiff's assignment was changed from one area in the city of Austin to a different area in the city of Austin and the Austin County area near Houston. This change in employment conditions adversely affected my training status as it entailed a complete evaluation of an entirely new inventory while retaining cases previously evaluated and continuing to be processed. This change also required a change in on-the-job instructors (OJI). These changes - doubling the inventory and changing the OJI - was [sic] not imposed on any other trainee under the same conditions and time. These changes also affected the Plaintiff's status as an employee as it permitted an opportunity for using later circumstances to conceal the discriminating reason of age in terminating training, reassignment and reduction in pay grade without good cause.

As a result of these changes, the Plaintiff's performance evaluation changed from Above Average by the first OJI to unsuitable or below average by the second less qualified and prejudiced OJI. The Plaintiff's assignment was then terminated and given to younger persons from a new class of trainees, while Plaintiff was detailed to another degrading task until accepting transfer to the lower grade at the Internal Revenue Service Center one month later.

The Plaintiff did not agree with the reasons given for the actions taken against him, and so stated that disagreement at each opportunity. It took much time and effort on the part of the Plaintiff to discover the facts and true circumstances, and uncover actions which were subtle since Plaintiff was not told forthrightly that he was too old. This culminated in Plaintiff contacting the EEO. Counselor in August, 1987 and filing a charge 24 September 1987.

The Plaintiff was told several times that older men, one with over 17 years with the IRS, thought the union could help them be retained as Revenue Officer Trainees, but they were now out. Maintaining a

younger workforce in order to attain retirement plans for Revenue Officers, i.e. retirement at age 55 years with 20 years of service, appears to be a motive for management action which adversely affected the Plaintiff. Plaintiff, without doubt, would have been treated differently if he were younger.

There was not a reasonable cause for the adverse action against the Plaintiff.

The actions of the agency, as exemplified by the EEOC, do not reflect the Congressional intent by limiting to 30 days the filing of a charge, since this is not jurisdictional and can be modified in age discrimination complaints, and none of the changes [sic] was considered on any of the merits.

10. The acts set forth in paragraph 8 of this complaint are still being committed by Defendants.
11. Plaintiff attaches to this complaint a copy of the charges filed with the Equal Employment Opportunity which charges are submitted as a brief statement of the facts supporting this complaint.

WHEREFORE, Plaintiff prays that the Court grant the following relief to the Plaintiff:

Defendants be directed to promote Plaintiff to the Grade GS-11, since he is qualified by education, experience and training to perform at that grade level and pay level if rated by an unbiased, objective, qualified and truthful supervisor.

Defendants be directed to award back pay to the date of change in Grade to compensate for the difference in pay of a Grade GS-9 employee, thus Plaintiff to be "made whole."

Defendants be directed to award other damages for pain and suffering by the Plaintiff in the amount of

\$25,000, or other amount to be decided by the court, for the more than a full year of extra work, time, expense, pain, suffering and embarrassment experienced by the Plaintiff and caused by the actions of the Defendants.

Defendants be directed to pay exemplary damages, since the discriminatory actions were willful violations of the Age Discrimination in Employment Act, by being done intentionally, knowingly and voluntarily. The action of the Defendants adversely affected the employment environment and the future advancement and promotion of the Plaintiff.

Defendants be directed to institute appropriate disciplinary action against three of the agents of the agency - Allen Bissell, Samuel Luna, and Andrew Cantu - for their discriminatory actions toward the Plaintiff.

Defendants be required to treat the charges as timely filed.

Defendants be directed to abolish the practice of individual OJI training, since the practice is inherently unfair, inequitable, unjust, subject to gross abuse and unsupervised, collusive management.

And that the Court grant such other relief as may be appropriate, including injunctive orders, costs and attorney's fees as may be needed.

/s/ Charles Z. Stevens, III
100 Ridgeway
 P.O. Box 1722
 San Marcos, TX 78667
 (512) 396-2630

.....
 [Exhibits omitted. Pertinent complaint exhibits are reproduced as separate items in the Joint Appendix]

C. Z. Stevens
 P. O. Box 1722
 San Marcos, TX 78667
 May 21, 1987

Representative J.J. Jake Pickle
 763 Federal Building
 Austin, TX 78701

Dear Congressman Pickle:

I am writing to you to request that you intercede in the refusal of the Manager of my Revenue Officer Group to certify me for continued employment as a Revenue Officer, GS-7 (Advanced Trainee) for promotion to Revenue Officer, GS-9 with the increased advancement and pay opportunities that would entail in the future. I think that discovery of the true circumstances will vindicate the effectiveness of my performance as a Revenue Officer Trainee and my fitness for eventual promotion. My successful collection of delinquent accounts and returns in a manner which reflected the best interest of the government will demonstrate this fact. I collected over \$220,000, which is more than twelve times my annual salary, during the five months of my probationary training.

It is apparent that I received unfair, unequal, even prejudicial treatment: my territory and case workload was changed, except for the priority cases I had already contacted or opened: my OJI was changed at the same time: reference manual and other tools were not timely supplied to me: my review immediately went from 'above average' to adverse: these conditions were not imposed on any other trainee in the group or the area to my knowledge. I am sure there was an ethnic factor as well

as an age factor in the circumstances which caused my noncontinuance.

I have discussed some details of this matter with Mr. Paul Hilgers and he suggested that I should write to you if I desired to pursue the circumstances further.

If you deem my position is not to be redressed, you may as a strong participant in the Oversight Committee of Congress for the Internal Revenue Service, want to institute a close look at the operations of the Revenue Officer Groups in Austin, Texas. I am surprised and amazed that such management and employment practices can exist in a United States Government Agency. The *'we may have to take you, but we don't have to keep you'* intent is evident, as six of the nine people in the initial group can relate.

It is not possible to enumerate the practices that became evident upon reflective scrutiny, such a lack of objective standardization in the OJI program where individual qualifications and abilities are so different in judging a trainee; where different requirements are set; where exceptionally long hours are required to compete in work accomplishment: where fear and rumor are fostered: where obstacles are deliberately setup to eliminate instead of train and instruct in order to make room for new trainees. These and other practices are used to justify an initial decision to not continue a trainee, seemingly as soon as he/she starts the program. The main fault of the operation is the objective of punitive enforcement rather than to properly collect the tax in full and to secure the delinquent returns and to prevent future delinquency by the same taxpayers. This type of management operation

should not be condoned by the Congress and the Taxpayers, unless effective checks and controls are required [sic].

I would appreciate hearing from you as soon as possible whether I can meet with you and give you any more specific information, or whether you can be of assistance to me. Thank you.

Sincerely,

/s/ Charles Zollie Stevens

Charles Zollie Stevens

Home: 512/396-2630

Work: 512/462-7333

CZS/ah

DEPARTMENT OF THE TREASURY
INDIVIDUAL COMPLAINT OF EMPLOYMENT
DISCRIMINATION

Based on

Race, Color, Religion, Sex, National Origin,
Age, Physical or Mental Handicap, or Retaliation

PLEASE TYPE OR PRINT

FOR OFFICE USE ONLY

COMPLAINT NO.

PLEASE NOTE: INFORMAL PRE-COMPLAINT EEO
COUNSELING IS A REQUIREMENT AND NO FORMAL
COMPLAINT CAN BE ACCEPTED FOR INVESTIGATION
WITHOUT IT.

1. CHARLES Z. STEVENS, III

Complainant's Name

P.O. BOX 1722

Home Address - Street, RD, P.O. Box

SAN MARCOS, TX 78667

City State Zip Code

Home Phone: Area Code (512) 396-2630

Work Phone: Area Code (512) 326-0045

FTS

Give area code and number where you can be reached during normal business hours if different from those above.

2. Designation of Representative. If you want someone other than yourself to represent you, you must sign and submit TD 62-03.2. "Designation of Representative and Limited Power of Attorney." (or a suitable alternative), with this Individual Complaint of Discrimination to the Regional Complaints Center processing your case.

If, after submitting this Individual Complaint of Employment Discrimination, you decide to have a Representative, you must IMMEDIATELY SIGN AND SUBMIT TD F 62-03.2. If having selected a

Representative and having submitted this form you WISH TO CHANGE your Representative, you must sign and submit a new TD F 62-03.2 naming your choice.

3. Are you now working for the Dept. of the Treasury?
Yes ☒ No ☐
Did you formerly work for the Dept. of Treasury?
Yes ☐ No ☐
If yes, when? _____
Have you applied for employment with the Dept. of Treasury?
Yes ☐ No ☐
If you responded Yes to either of the first two questions, give title, series, grade and organization unit.
4. In what organization, office or unit of the Department do you believe discrimination/retaliation against you occurred? *I.R.S. Collection Division Austin District Office Revenue Officer Group 1300 Austin, TX*
5. What was the date of the last alleged discriminatory/retaliatory event or incident covered in counseling? *Continuing - see final report of EEO Counselor W. Stansel dated 10-14-87*
6. If you became aware of the alleged discriminatory/retaliatory event or incident covered in counseling on a date substantially different from that shown in 5, show date and explain. *On 4-27-87 as the date of re-assignment to a lower grade at AUSC & continuing to present.*
7. What was the date of your last interview with the EEO counselor? State name of counselor, where located, and telephone number.
*10-14-87 last interview
Willie P. Stansel
300 E. 8th - 4160 Ave.
Austin, TX 78701
FTS 772-5211*

8. On this same matter have you filed a grievance under a negotiated grievance procedure?
Yes ☐ No ☒
Under the Agency grievance system?
Yes ☐ No ☒
Have you appealed to MSPB? Yes ☐ No ☒
State where and when filed or appealed, give identifying numbers and describe present status. *N/A*
9. Check *only* the basis or bases on which you think you were discriminated against. Put information in the space provided *only* for the category or categories in which you are alleging discrimination. If alleging age discrimination, give date of birth. (To file a complaint based on age, you must have been at least 40 years old when the matter of concern occurred.)
☒ AGE ☐ COLOR: ☐ ☐ SEX ☐
☐ NATIONAL ORIGIN
DATE OF BIRTH *08-10-23*
☐ RACE ☐ RELIGION ☐
☐ RETALIATION/REPRISAL
☐ FOR INVOLVEMENT IN
COMPLAINTS PROCESS
HANDICAP:
☐ MENTAL
☐ PHYSICAL
10. State your complaint, identify the specific acts, incidents or events which you believe were discriminatory or in retaliation against you. Show the dates on which these acts, incidents or events occurred. If you are alleging that you are perceived as being handicapped, you should include a statement of the manner in which you feel you were discriminated against, e.g., failure to modify work site, failure to offer opportunity for training or advancement. If

you are handicapped and your complaint is concerned with a specific job, training, etc., you should offer evidence that you were qualified for the position, training, etc. which you sought. If handicapped, you should also request the reasonable accommodation you prefer, if appropriate. If you feel this space is not adequate to provide sufficient information to understand your complaint, you may use an extra sheet. If your complaint is accepted for processing, you will be given the opportunity to provide a detailed affidavit.

I was terminated as an Advanced Trainee Revenue Officer GS-7 by Group Manager, Sam Luna, effective 4-26-87. The verbal reason he gave to me was "workload potential," although subsequent indications were their age was the primary reason, if not the sole reason. Luna stated that Branch Chief Allen Bissell knew and approved of this action. I was transferred to the Austin Compliance Center at a lower grade of GS-6 on 4-27-87. I had told each person in the chain of management that I disagreed with the failure to certify me as a GS-9 Revenue Officer at each opportunity, but was forced to agree to request a transfer in order to keep working for the needed income.

In order to conceal the real reason (age), my territory was changed from Austin City to Austin County near Houston, my number of cases were doubled and my OJI was changed to Andy Cantu. His conduct (and OJI qualifications) in support of Bissell's and Luna's decisions are now apparent and should be addressed later. It is significant that no other trainee was given this treatment. Also, an IRM, computer (PERS) and other tools were not timely supplied to me. My evaluation report went from above average to unsatisfactory for one critical [illegible] and just prior to the ten month deadline.

11. State the remedial or corrective action you are seeking to resolve your complaint.

- 1* *Re-assignment and certification as a Revenue Officer Grade GS-9 effective in July, 1987 when due originally.*
2. *Disciplinary action against Bissell, Luna and Cantu.*
**Note: Counselor misunderstood relief or remedy on his report.*

12. You must sign and date this complaint.

This is also my notice of intention to sue in U.S. Civil District Court if the matter is not satisfactorily resolved.

/s/ Charles Z. Stevens, III

Signature

October 19, 1987

Date

DEPARTMENT OF THE TREASURY

Regional Complaints Center

7839 Churchill Way, LB-80,
Dallas, Texas 75251

DEC 03 1987

Mr. Charles Z. Stevens, III
P.O. Box 1722
San Marcos, Texas 78667CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: TD Case Number 88-2012

Dear Mr. Stevens:

I have reviewed the above referenced complaint of discrimination which was filed on October 19, 1987. The discrimination complaint regulation, 29 CFR 1613.215, provide that an agency may reject a complaint if: (1) the complainant failed to contact an EEO Counselor within 30 days of the date of the matter alleged to have been discriminatory, or, if the matter alleged to be discriminatory is a personnel action, within 30 days of the effective date of the personnel action; or (2) if the complaint was not filed within 15 days of the date of the final interview with the EEO Counselor. The Agency may extend these time limits if the complainant can show that he/she was unaware of the time limits or was prevented by circumstances beyond his/her control from meeting those time limits, 29 CFR 1613.214. The complainant must have the opportunity to show that he/she was prevented from meeting the time limits. *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir. 1981); *Salz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982).

The record shows that on March 23, 1987, you received notice that you would not be certified as a Revenue Officer, GS-1169-09. The reason cited for the recommendation was an extremely high percentage of errors in most of the critical elements.

By memorandum dated March 26, 1987, you requested reassignment to the Austin Service Center. in a memorandum dated April 27, 1987, to the Personnel Branch, you requested a change to lower grade from Revenue Officer, GS-1169-07, to a Tax Examining Assistant, GS-592-06, Examination Division, Austin Compliance Center. The effective date of the change to lower grade was April 26, 1987.

The record shows that by letter dated May 21, 1987, to Representative J.J. Pickle, you requested that he intercede on your behalf for certification as a Revenue Officer. By letter dated June 12, 1987, Congressman Pickle, advised the District Director, Austin, of your request for assistance and requested that he discuss the situation with you. On July 2, 1987, the District Director advised Congressman Pickle that your reassignment was voluntary and you had discussed many of his concerns with all levels of management, including the Assistant District Director.

On September 24, 1987, (151 days after the change to lower grade and transfer to the Austin Service Center) you contacted an EEO Counselor and entered into counseling. Upon receipt of the formal complaint on October 23, 1987, the EEO Specialist telephoned you and requested that you prepare a written explanation as to why you were untimely in contacting an EEO Counselor.

You stated, "I did not contact an EEO Counselor because I wasn't aware that I could could [sic] so." In your letter dated November 11, 1987, you failed to show that you were unaware of the time limits or that you were prevented by circumstances beyond your control from meeting the time limits. You stated in your letter that when it became clear that a correction of the discriminatory persons' decisions could not be achieved, you were advised to file an EEO complaint. You chose to have the Office of Congressman Pickle look into the alleged discriminatory matter and only after you exhausted this avenue did you contact an EEO Counselor. In your letter, you also referred to pages 116-118 of the Federal Personnel Guide, where you highlighted the section emphasizing reaching informal settlements. The third paragraph clearly states that you must first contact (orally or in writing) an EEO Counselor at the Agency where you work or applied for a job within 30 calendar days of the alleged discriminatory action. Therefore, your statement that the date that you knew or should have known of the discriminatory event was not possible to set because the events were continuing is highly questionable. The record reflects that you were advised of the reasons for the reassignment and you discussed your concerns with all levels of management, including the Assistant Director. Your contact with the counselor on September 24, 1987, (151 days after the alleged discriminatory event) was untimely and you have not provided adequate justification for extending the time limit. Therefore, I am rejecting your complaint based on untimeliness.

Based on the foregoing, I am rejecting the above referenced complaint of discrimination dated October 19,

1987, in accordance with Equal Employment Opportunity Regulation 29 CFR 1613.215., because of your untimeliness in contacting an EEO Counselor. This constitutes a final agency decision on this issue.

An award of attorney fees is inappropriate. Your appeal rights are enclosed.

Sincerely,

/s/ Maureen C. Bass
Maureen C. Bass
Director
Regional Complaints Center

Enclosure
As Stated

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

Charles Z. Stevens,)	
)	Appeal No..
Appellant,)	01880847
)	Agency No.
v.)	88-2012
Department of the Treasury,)	
)	
Agency.)	

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* The final agency decision was received by appellant on December 8, 1987. The appeal was postmarked December 22, 1987. Accordingly, the appeal is timely (*see* 29 C.F.R. § 1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

The issue on appeal is whether the agency properly rejected appellant's complaint on the grounds that appellant failed to seek EEO counseling in a timely fashion.

A review of the record reveals that appellant, a revenue officer trainee, alleges discrimination based on age when he was advised on March 23, 1987 that he would not be certified as a revenue officer, and when he was transferred effective April 27, 1987 to another agency office with a lower GS grade.

EEOC Regulation 29 C.F.R. § 1613.214(a)(1)(i) requires that complaints of discrimination be brought to the attention of the Equal Employment Opportunity Counselor within thirty (30) calendar days of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action. Here, the record reflects that appellant first sought EEO counseling with respect to the rejected complaint on September 24, 1987, which is beyond the thirty (30) calendar day time limit set by the Regulations.

In a letter to his Congressman dated May 21, 1987 appellant stated: "I am sure there was an ethnic factor as well as an age factor in the circumstances which caused my non-continuance." Apparently by May 21, 1987 appellant knew of the alleged age discrimination. Appellant failed to submit adequate justification, pursuant to 29 C.F.R. § 1613.214(a)(4), for extending the time limitation beyond thirty (30) days. Accordingly, the agency's decision to reject appellant's complaint as untimely was proper and is AFFIRMED. 29 C.F.R. § 1613.215(a)(4).

A Statement of Appellant's Rights (R-1) is attached to this Decision.

FOR THE COMMISSION:

/s/ Dolores L. Rozzi
Dolores L. Rozzi, Director
Office of Review and Appeals

MAR 30 1988
DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

(Transcript Excerpts from Argument on
Rule 41(b) Motion)

[79] MS. SMITH: [Counsel for Defendants] Your Honor, defendants would ask this Court for a ruling based on Rule 41(b), that plaintiff's complaint should be dismissed * * * .

Plaintiff has failed to establish why, or to show any evidence why he waited until September of 1987 to file, to go to an EEO counselor to bring up the complaint of age discrimination, when he was reassigned in April and wrote to his congressman in May that he believed his reassignment was based on age discrimination. Plaintiff presented no evidence to show why he failed to meet the 30-day time period required by the ADA Act, and to raise any equitable grounds as to why that period should be tolled. * * *

THE COURT: I would like to hear, Mr. McKee, particularly on the first point. What is with the April to [80] September time period?

MR. McKEE: [Counsel for Plaintiff] Your Honor, * * * I believe the law is, and the Age Discrimination in Employment Act, different than in other civil rights actions in that a party, a complainant could forego the EEO complaint route completely, the administrative route. I believe that what they are suggesting is that he must complete the administrative route before he can bring suit in this Court. I don't believe that that is the law. I think the law is that as long as notice is provided within a 180-day period, that he can bring suit at anytime

by giving 30 days notice to the parties involved. I think he did in fact do that within the 180 days, * * *

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 5, 1990

Mr. Alison Steiner
P. O. Box 368
224 Second Avenue
Hattiesburg, MS 39401

Re: Charles Z. Stevens, III
v. Department of the Treasury, et al.
No. 89-1821

Dear Mr. Steiner:

The Court today entered the following order in the
above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
Joseph F. Spaniol, Jr., Clerk

No. 89-1821

Supreme Court, U.S.

FILED

DEC 20 1990

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

CHARLES Z. STEVENS, III,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE TREASURY,
NICHOLAS F. BRADY, SECRETARY,
U.S. DEPARTMENT OF THE TREASURY,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals erroneously construed the language of § 633a(d) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., which provides that a notice of intent to file a civil action must be given "not less than" thirty days prior to suit when it decided that a federal employee's otherwise timely filing of a § 633a(d) notice of intent was rendered "ineffective" as a predicate for an ADEA civil action because the civil action was instituted more than thirty days after the notice was given.
- II. Whether a federal employee's untimely attempt to seek administrative relief pursuant to § 633a(b) of the Age Discrimination in Employment Act of 1967 amounts to an irrevocable election of remedies and/or a failure to exhaust required administrative remedies which precludes suit under § 633a(d) of the Act, even though the employee also timely complied with all procedural prerequisites to bringing suit under § 633a(d).

LIST OF PARTIES

Parties to this case are:

Charles Z. Stevens, III, Plaintiff-Petitioner

United States Department of the Treasury, Defendant-Respondent

James A. Baker, III former Secretary of the Treasury, Defendant-Appellee below

Nicholas F. Brady, Secretary of the Treasury (successor to James A. Baker, III as Secretary of the Treasury), Defendant-Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
DECISIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Petitioner's Civil Action was Filed in a Timely Fashion After Petitioner Gave his Notice of Intent to File Suit	9
II. Petitioner Should not be Foreclosed From Pursuing his § 15(d) Civil Action Simply Because he Failed Timely to Invoke his § 15(b) Administrative Remedies	12
A. The Plain Language of the Act Supports not Binding Federal ADEA Claimants to a Strict Election or Exhaustion of Remedies	18
B. The Legislative History Supports the Plain Language of the Statute in not Binding Federal ADEA Claimants to a Strict Election or Exhaustion of Remedies	23

TABLE OF CONTENTS - Continued

	Page
C. This Court's Guiding Principles in Interpreting Federal Anti-Discrimination Statutes also Support not Imposing a Stringent Election or Exhaustion Requirement on Federal ADEA Claimants	34
CONCLUSION	41

TABLE OF AUTHORITIES

	Page
CASES	
<i>Alexander v. Gardner-Denver</i> , 415 U.S. 36 (1974)	35
<i>Atkins v. Rivera</i> , 477 U.S. 154 (1986)	39
<i>Bengochea v. Norcross, Inc.</i> , 464 F.Supp. 709 (E.D.Pa. 1979)	10
<i>Bowen v. City of N.Y.</i> , 476 U.S. 467 (1986)	36
<i>Brown v. GSA</i> , 425 U.S. 820 (1976)	12, 16, 18, 36
<i>Bornholdt v. Brady</i> , 869 F.2d 57 (2nd Cir. 1989)	11, 15
<i>Castro v. U.S.</i> , 775 F.2d 399 (1st Cir. 1985)	passim
<i>Chandler v. Roudebush</i> , 425 U.S. 840 (1976)	20, 35, 36, 37, 38
<i>Chevron v. NRDC</i> , 467 U.S. 837 (1984)	39
<i>Coit Independence Joint Venture v. FSLIC</i> , 489 U.S. 561 (1989)	35
<i>Davis v. Devine</i> , 736 F.2d 1108 (6th Cir. 1984), cert. den., 469 U.S. 1020 (1984)	17
<i>EEOC v. Assoc. Dry Goods Corp.</i> , 449 U.S. 590 (1981)	39
<i>FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981)	39, 41
<i>Firefighters v. Cleveland</i> , 478 U.S. 501 (1986)	39
<i>Ford Motor Credit Co. v. Cenance</i> , 452 U.S. 155 (1981)	39

TABLE OF AUTHORITIES - Continued

	Page
<i>Honig v. Doe</i> , 484 U.S. 305 (1988).....	36
<i>Irwin v. Veterans Administration</i> , ___ U.S. ___, 59 U.S.L.W. 4021 (Dec. 3, 1990)	34
<i>Kennedy v. Whitehurst</i> , 690 F.2d 951 (D.C. Cir. (1982))	13, 18, 21, 33, 37
<i>Langford v. U.S. Army Corps of Engineers</i> , 839 F.2d 1192 (6th Cir. 1982).....	13, 14, 15, 18, 33
<i>Lehman v. Nakshian</i> , 453 U.S. 156 (1981)	passim
<i>Limongelli v. Postmaster General of the U.S.</i> , 707 F.2d 368 (9th Cir. 1983).....	14, 33
<i>Loe v. Heckler</i> , 768 F.2d 409 (D.C. Cir. 1985)	16
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978)	36
<i>Love v. Pullman Co.</i> , 404 U.S. 522 (1972).....	34
<i>Marks v. Turnage</i> , 680 F.Supp. 1241 (N.D.Ill. 1988), modified 47 BNA FEP Cases 666 (1988)	11
<i>McGinty v. Dept. of the Army</i> , 900 F.2d 1114 (7th Cir. 1990)	passim
<i>McIntosh v. Weinberger</i> , 810 F.2d 1411 (8th Cir. 1987) vacated and remanded on other grounds sub nom. <i>Turner v. McIntosh</i> , 487 U.S. 1212 (1988)	13, 17, 18, 21, 33
<i>Oscar Mayer & Co. v. Evans</i> , 441 U.S. 750 (1979)	10, 37, 38
<i>Proud v. U.S.</i> , 872 F.2d 1066 (D.C. Cir. 1989).....	13

TABLE OF AUTHORITIES - Continued

	Page
<i>Public Employees v. Betts</i> , 492 U.S. ___, 106 L.Ed.2d 134, 109 S.Ct. 2854 (1989).....	39, 40
<i>Purtill v. Harris</i> , 658 F.2d 134 (3rd Cir. 1981) cert. den., 462 U.S. 1131 (1983).....	passim
<i>Ray v. Nimmo</i> , 704 F.2d 1480 (11th Cir. 1983)	passim
<i>Romain v. Shear</i> , 799 F.2d 1416 (9th Cir. 1986) cert. den., 481 U.S. 1050 (1987).....	14
<i>Sullivan v. Everhart</i> , ___ U.S. ___, 108 L.Ed.2d 72 110 S.Ct. 960 (1990)	39
<i>Wade v. Sec. of Army</i> , 796 F.2d 1369 (11th Cir. 1986)	16
<i>White v. Frank</i> , 895 F.2d 243 (5th Cir. 1989) cert. den. ___ U.S. ___, 111 S.Ct. 232 (1990).....	passim
<i>White v. Frank</i> , 718 F.Supp. 592 (W.D. TX 1989)	14, 21, 22, 40
<i>Wiersma v. Tennessee Valley Authority</i> , (C.A. No. 3-85-1160, E.D. Tenn., March 12, 1986), 41 BNA FEP Cases 1588, 41 CCH EPD paragraphs 36518-36519	11
<i>Wright v. Tennessee</i> , 628 F.2d 949 (6th Cir. 1980)	10
<i>Zipes v. Trans World Airlines</i> , 455 U.S. 385 (1982)	34
STATUTES	
Age Discrimination in Employment Act of 1967	
29 U.S.C. § 621 et seq.....	19, 24
§ 7, 29 U.S.C. § 626	passim
29 U.S.C. § 630(b)	27
§ 14, 29 U.S.C. § 633	37, 38
§ 15, 29 U.S.C. § 633a	passim

TABLE OF AUTHORITIES - Continued

Page

Fair Labor Standards Act

29 U.S.C. § 255..... 24

29 U.S.C. §§ 211, 215, 216, 217 and 259 24

Title VII of the Civil Rights Act of 1964

§ 42 U.S.C. § 2000e-2..... 26

§ 717, 42 U.S.C. § 2000e-16 *passim*

Pub. L. 90-202, 81 Stat. 602 10, 25, 29

Pub. L. 93-259, 88 Stat. 55 19

5 U.S.C. § 903..... 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2102(c) 1

28 U.S.C. § 2401..... 11

RULES AND REGULATIONS

Fed. R. Civ. P. 41(b) 5

29 Code of Federal Regulations, Part XIV 2

29 CFR § 1613.214-1613.421 2, 20, 26

1613.214.....3, 31

1613.214(a)(1)(i).....17, 22, 26, 31, 32

1613.233..... 16

1613.501-1613.5212, 20

TABLE OF AUTHORITIES - Continued

Page

1613.511.....3, 39

1613.513..... 15, 20, 39

1613.514.....20, 39

1613.521..... 16, 20, 39

OTHER AUTHORITIES

113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits) 33

118 Cong. Rec. 7745 (1972) (remarks of Sen.
Bentsen)..... 27118 Cong. Rec. 15894-96 (1972) (remarks of Sen.
Bentsen).....27, 32

118 Cong. Rec. 24396 (1972) (text of Bill)..... 28

123 Cong. Rec. 34296 (1977) (remarks of Sen. Wil-
liams)..... 25

124 Cong. Rec. 7882 (1978) (remarks of Rep. Quie) 25

124 Cong. Rec. 8217 (1978) (remarks of Sen. Wil-
liams)..... 25H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess.
(1978), *reprinted in* 1978 U.S. Code Cong. &
Admin. News 533 25H.R. Rep. No. 238, 92nd Cong., 2d Sess. (1972),
reprinted in 1972 U.S. Code Cong. & Admin.
News 2137 32H.R. Rep. No. 913, 93rd Cong., 2d Sess. (1974),
reprinted in 1974 U.S. Code Cong. & Admin.
News 2811 28

TABLE OF AUTHORITIES - Continued

	Page
S. 1861, Amend No. 1177, 92nd Cong., 2d Sess. 118 Cong. Rec. 15895 (1972)	27
S. 3318, 92nd Cong., 2d Sess. (1972)	27
S. Rep. No. 842, 92nd Cong., 2d Sess. (1972)	28
S. Rep. No. 300, 93rd Cong., 1st Sess. (1973)	30
S. Rep. No. 493, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 504	25

DECISIONS BELOW

The *per curiam* panel opinion of the United States Court of Appeals for the Fifth Circuit of February 21, 1990 in Case No. 89-1432, Summary Calendar, is unreported and appears as Exhibit B to the Petition for Writ of Certiorari [Pet. App. A-5 - A-8].

The Memorandum Opinion and Order of the United States District Court for the Western District of Texas filed April 19, 1989 in Civil Action No. A-88-CA-340 is also unreported and appears as Appendix A to the Petition for Writ of Certiorari [Pet. App. A-1 - A-4].

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 21, 1990.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari was filed timely pursuant to 28 U.S.C. § 2102(c), and was granted November 5, 1990.

STATUTES PRESENTED FOR REVIEW

The statutory provisions involved in this case are subsections (b), (c) and (d) of § 15 of the Age Discrimination in Employment Act of 1967, as amended by the Fair Labor Standards Amendments of 1974, 29 U.S.C. § 633a(b), (c) and (d). These statutory provisions are lengthy and are therefore not set forth here. They appear

as Appendix C to the Petition for Writ of Certiorari (Pet. App. A-9 - A-10).

The federal regulations pertinent to this case are 29 Code of Federal Regulations, Part XIV, § 1613.214 and §§ 1613.501-521 (1989). Said regulations are lengthy and are therefore not set forth here. They appear as Appendix D to the Petition for Writ of Certiorari (Pet. App. A-11 - A-15).

STATEMENT OF THE CASE

In August, 1986, at the age of sixty-three, Petitioner Charles Z. Stevens was accepted into a Revenue Officer Training Program with the Internal Revenue Service in Austin, Texas [RTr 5]¹ as a GS-7 level civil service employee [J.A. 14]. He remained in that program until April 27, 1987 when, after a transfer to a new geographic area and assignment to a new training instructor (RTr 9-10), he was directed by the instructor to request a demotion to a GS-6 job and a transfer out of the trainee program [RTr 11-12]. Younger trainees were retained in the program [RTr 24-25].

¹ The record in this case consists of two separately paginated bound volumes, a volume of pleadings, designated in this brief as RPl, and a volume containing the trial transcript, designated in this brief as RTr. In addition, the record includes the exhibits introduced by the parties at trial which are not separately bound or paginated and which will be referred to in this brief by exhibit number as either Plaintiff's Exhibit (P Ex.) or Government's Exhibit (G Ex.). Citations to the Joint Appendix are designated J.A.

Believing the forced demotion/transfer to be unfair and possibly discriminatory, Petitioner contacted his Congressman requesting assistance [J.A. 8-10]. When that avenue of relief did not bear fruit [G Ex 2, pp. 103-110; RTr 25-26], Petitioner began the odyssey in search of a determination of the merits of his claim by which he has arrived at this Court. He is, however, despite his efforts, still without any judicial or administrative decision as to whether he has been discriminated against.

Sometime in September, 1987, Petitioner attempted to invoke his agency's internal administrative age discrimination grievance procedures by contacting agency EEO personnel. On September 24, 1987, he was granted a formal interview with an EEO counselor [RTr 26]. Because this date was more than thirty days² from the date of the allegedly discriminatory action, however, Petitioner's complaint was treated by the agency as having been filed out of time and the only issue that the agency considered in its adjudicative procedures was whether or not the requisite good cause for the out of time filing could be shown [G Ex 2 p. 76; J.A. 16-19]. Petitioner believed he did have good cause for the delay, so he proceeded through the administrative process in an attempt to

² Under the regulations promulgated by the EEOC relative to enforcement by federal employees of their rights under § 15 of the ADEA, 29 U.S.C. § 633a, contacting an agency EEO counselor within thirty days of the discrimination, or having good cause for not doing so, is a required first step if the employee wishes to invoke the complex internal agency administrative process provided for under § 15(b) for administratively ascertaining and resolving the merits of his or her age discrimination claim, 29 C.F.R. § 1613.214; § 1613.511.

establish such cause, filing a formal complaint [J.A. 11-15] and awaiting final administrative decisions on the good cause issue from the Regional Complaint Center of the Department of the Treasury [J.A. 16-19] and, on appeal, from the Office of Review and Appeals of the Equal Employment Opportunity Commission [J.A. 20-21]. Both the agency and the EEOC ORA, however, determined that Petitioner had not established good cause for his delay in seeking EEO counseling. Therefore, the final agency action was a rejection of the formal complaint and the administrative process never actually addressed the substantive merits of Petitioner's age discrimination claim.

Recognizing the possibility that his complaint might be rejected due to the untimely filing, Petitioner consulted his Federal Employee Personnel Manual and discovered that with respect to his claim of age discrimination there was an alternative way to preserve the right to go to court on the merits of his complaint. He could file a notice of his intent to institute a civil action and, provided he did that within 180 days of the actual discrimination and permitted that notice to remain on file for thirty days, could proceed to federal court at any time within six years of the occurrence of the alleged discriminatory act [RTr 17-18, 22; G Ex 4, p. 68]³. In conformance with this directive, Petitioner filed his notice of intent on October 19, 1987 [Pet. App. A-7][J.A. 15], 176 days from

³ Although the manual does not cite any specific statute, this is clearly a description of the mechanism prescribed by § 15(d) of the ADEA, 29 U.S.C. § 633a(d), for bypassing internal administrative remedies, together with a statement as to the agency's interpretation of the applicable statute of limitations. See discussion at p. 11, *infra*.

the date of the alleged discrimination, in order to preserve his right to sue in the event the agency rejected his administrative complaint.

Petitioner awaited the final administrative decision on the timeliness issue, and received his notice of the March 30, 1988 rejection of his complaint on April 4, 1988 [RTr 82]. Petitioner filed his civil action in the United States District court for the Western District of Texas on May 3, 1988, a date within thirty days of his receipt of the final administrative decision and more than thirty days from the date on which he had previously given his notice of intent to file civil action [J.A. 2,15]. Petitioner's *pro se* complaint, alleged, *inter alia*, that he had been the victim of age discrimination and sought a remedy pursuant to § 15 of the Age Discrimination in Employment Act, 29 U.S.C. § 633a [J.A. 2]. He attached to the complaint copies of the administrative complaint [J.A. 11-15], the decisions rejecting it [J.A. 16-19, 20-21], and of the notice of intent to file civil action [J.A. 15].

Petitioner proceeded with his matter *pro se* until December, 1988 when he was finally able to obtain counsel to represent him in the district court [J.A. 1]. The case proceeded to trial in district court on March 29, 1989 [J.A. 1]. At the one-day bench trial the court, without objection from either party, took evidence as to both the substantive merits of the age discrimination claim and the reasons for Petitioner's delay in initially contacting the EEO counselor.

At the conclusion of the Petitioner's case, the Government made a motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for dismissal of the

complaint arguing, *inter alia*, that the Petitioners' untimely invocation of the internal agency remedy procedures deprived the Court of jurisdiction to hear the case altogether [RTr 79]. Petitioner answered that the alternative procedure found in § 15(d) of the ADEA, 29 U.S.C. § 633a(d), permitted bypassing the administrative complaint route, and argued that the Government's dismissal motion improperly assumed the necessity of exhausting administrative remedies, and that the notice of intent that the Petitioner had filed within 180 days of the allegedly discriminatory act provided a sufficient jurisdictional basis for the Court to consider the merits of Petitioner's claim [RTr 80] [J.A. 22-23]. The district court reserved ruling on the 41(b) motion [RTr 83] and directed the Government to present its evidence, which it did as to both the merits and the timeliness issue [RTr 83-176].

In a written Order and Memorandum Opinion issued April 7, 1989, the district court concluded that the Petitioner had filed his internal administrative complaint too late, and had not demonstrated sufficient good cause to permit either the agency or the court to consider the merits of his case pursuant to § 15(b) of the ADEA, 29 U.S.C. § 633a(b) [Pet. App. A-2 - A-3]. The district court also addressed the bypass option of § 15(d) but misconstrued the language of that section to require filing the actual civil action as opposed to the notice of intent to sue within 180 days of the allegedly discriminatory act. Since the civil action was clearly filed more than 180 days from the date of the discrimination the District Court concluded that no § 15(d) predicate for jurisdiction existed either [Pet. App. A-3], and dismissed the case.

Petitioner made a timely appeal of this decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's ruling with respect to § 15(d), specifically holding that Petitioner had complied with the requisites of § 15(d) by giving notice on October 19, 1987 of his intent to file suit [Pet. App. A-7]. The Court of Appeals went on to conclude, however, that this properly given notice was rendered "ineffective" by the fact that "Stevens did not initiate the present action in federal court until May 4, 1988" [Pet. App. A-7]. The Court of Appeals therefore, affirmed the district court's dismissal of the case.

Petitioner does not challenge the finding that he contacted his EEO counselor too late to obtain administrative adjudication of his claim. Petitioner does challenge the ruling of the court of appeals that the district court had no jurisdiction because of the lapse of more than thirty days between the filing of the § 15(d) notice and the institution of the federal court action. Petitioner contends that this simply misreads the words "not less than" in the Age Discrimination In Employment Act to mean "not more than." Petitioner also challenges the implicit ruling of the court of appeals that Petitioner was entirely foreclosed from bypassing the § 15(b) administrative procedures pursuant to § 15(d) due to the fact that he had made his failed attempt to invoke § 15(b) administrative procedures. Petitioner contends that this ruling both imposes on him a duty to exhaust his administrative remedies, and binds him irrevocably to the outcome of those administrative remedies, neither of which are required by the statute.⁴

⁴ Although the Fifth Circuit did not specifically articulate that it was imposing stringent exhaustion and election

Petitioner respectfully submits that on certiorari this Court should rectify these errors of the court below.

SUMMARY OF ARGUMENT

The stated basis for the Fifth Circuit's affirmance of the dismissal of Petitioner's case was simply a mis-reading of the requirement of § 15(d) of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(d) that an age discrimination claimant give "not less than thirty days notice" of his intention to file suit. The Fifth Circuit construed this to mean that a suit filed more than thirty days from the notice was untimely. In fact, the clear meaning of "not less than" in this and other statutes in which it appears is that the notice must last for at least thirty days but that a suit filed any time after thirty days is properly filed.

The Fifth Circuit's affirmance of the dismissal of Petitioner's case also held implicitly that Petitioner had given up his right to proceed to federal court through the mechanism prescribed by § 15(d) of the Age Discrimination

(Continued from previous page)

requirements, its decision is fully consistent with *White v. Frank*, 895 F.2d 243 (5th Cir. 1990), *cert. den.* ___ U.S. ___, 111 S.Ct. 232 (1990) (White and Blackmun, J.J., dissenting), decided shortly after the instant case, in which the Fifth Circuit clearly and explicitly adopted a requirement that federal employee ADEA claimants are bound to exhaust administrative remedies, once invoked, notwithstanding the existence of bypass procedures under the statute. The Fifth Circuit has not spoken to the election issue other than implicitly in this case.

in Employment Act because he attempted, but failed, to seek an alternative method of relief under § 15(b) of the Age Discrimination Act. The plain statutory language, supported by the legislative history of the statute, makes it clear that § 15 imposes no requirement on § 15 age discrimination claimants that they exhaust § 15(b) administrative remedies at all. Nor does anything in the language or legislative history of § 15 justify holding that a failed attempt to invoke administrative remedies under § 15(b) would preclude access to federal court under § 15(d). This Court's prior decisions interpreting employment discrimination statutes and concerning election and/or exhaustion of remedies also lead in the direction of not requiring exhaustion in ADEA cases and not binding ADEA claimants to a preclusive election of remedies under the circumstances presented here..

ARGUMENT

I. Petitioner's Civil Action Was Filed In A Timely Fashion After Petitioner Gave His Notice Of Intent To File Suit.

The court of appeals' unpublished opinion in this case relies on the seven month time lapse between the date it holds Petitioner gave his notice of intent to sue as required under § 15(d) of the Act (Pet. App. A-6 - A-7) and the date suit was actually filed to conclude that Petitioner's notice of intent was "not effective" as a predicate for Petitioner's civil action. This appears simply to be a misreading of the plain language of the statute, construing the requirement of § 15(d) that an individual

must give "not less than thirty days notice of intent to file" as if it meant that suit must be filed "not more than thirty days from the notice". In arriving at this construction, the court of appeals may have adopted a similar error made by the district court, when the district court held that under § 15(d) a complainant is required to "notify the EEOC within thirty days prior to commencing suit" (Pet. App. A-3).

The use of the term "not less than" to mean "at least" or "equal to or more than" is common in English. In this statute it has a clear meaning that a minimum of thirty days notice must be given before a lawsuit is commenced. It does not, however, prevent a notice longer than thirty days from being effective. The language employed in the original version of the private sector Age Discrimination in Employment Act of 1967 (81 Stat. 605, § 7(d), current version codified at 29 U.S.C. § 626(d)) is identical in all respects except as to the actual length of the notice to the language of § 15(d). It has been consistently interpreted to mean that the claimant must give notice of at least sixty days, after which time suit could be filed at any time within the applicable statute of limitations, e.g., *Wright v. Tennessee*, 628 F.2d 949 (6th Cir. 1980), *Bengochea v. Norcross, Inc.*, 464 F.Supp. 709 (E.D.Pa. 1979), see also, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 754 (1979) (Respondent [plaintiff below] filed notice of intent on March 10, 1976. Suit in district court instituted March 7, 1977. No contention that suit was untimely because of failure to meet § 7(d) notice requirements).

It has thus been implicitly recognized by this Court that the words "not less than" in the ADEA mean that a civil action is timely filed at any time thirty days or more

after the filing of a notice of intent. Indeed, the Respondents have conceded in this Court that "the notice in this case clearly complied with the thirty day requirement in § 633a(d)" and agree that the court of appeals appears to have adopted the district court's misreading of "not less than" to mean "within", Brief of Respondents in Opposition to Granting Writ at 7.

The seven month time lapse between October, 1987 and May 3, 1988 also falls well within any statute of limitations that might apply to this action, whether it is the statute for private sector ADEA actions, 29 U.S.C. § 626 (incorporating the general Fair Labor Standards Act limitation, § 29 U.S.C. 255, two years for non-wilful violations, three years for wilful violations), see *Wiersma v. Tennessee Valley Authority*, C.A. No. 3-85-1160, (E.D. Tenn., March 12, 1986), 41 BNA FEP Cases 1588, or the general six year statute of limitations for actions against the federal government, 28 U.S.C. § 2401(a), *Bornholdt v. Brady*, 869 F.2d 57, 68 (2nd Cir., 1989), *Marks v. Turnage*, 680 F.Supp. 1241 (N.D.Ill. 1988), modified 47 BNA FEP Cases 666. Moreover, the Petitioner's suit was filed within thirty days of his notice of the final agency action rejecting his claim, which would make it timely even if, contrary to *Bornholdt*, the thirty-days-from-notice-of-agency-action requirement of Title VII of the Civil Rights Act of 1964, § 717(c), 42 U.S.C. § 2000e-16(c) were held to apply to § 15 of the ADEA.

The passage of the seven months between the filing of the notice of intent and institution of suit in the instant case does not, therefore, render Petitioner's otherwise timely notice "not effective" as a predicate to suit. This

Court, having granted certiorari, should take the opportunity to correct this clear error of law by reversing the decision of the court of appeals and remanding the case for further consideration under the correct reading of the thirty day notice requirement of § 15(d).

II. Petitioner Should Not Be Foreclosed From Pursuing His § 15(d) Civil Action Simply Because He Failed Timely To Invoke His § 15(b) Administrative Remedies.

With the grant of certiorari in this case, this Court has an opportunity to resolve a growing dispute among the circuits concerning whether § 15 of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, is to be read as it is written and allow federal employees to proceed directly to federal court for a resolution of their age discrimination claims after giving thirty days notice of their intent to do so, § 15(c) and (d), or whether the courts will be permitted to read into the Act a preclusive requirement of election and exhaustion of the optional internal agency administrative remedies available under § 15(b). The latter approach reads into the ADEA an exhaustion requirement similar to the exhaustion required of federal employees with race, color, sex, religion and national origin discrimination claims by § 717(c) of Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-16, *Brown v. GSA*, 425 U.S. 820, 835 (1976), but without the right § 717(c) gives to abandon the administrative process if it is not completed in 180 days.

Noting that on its face § 15(c) of the Age Discrimination in Employment Act differs from § 717(c) of the Civil

Rights Act by specifically granting jurisdiction to the federal courts *without* requiring exhaustion of administrative remedies, and that § 15(d) also provides a specific mechanism for bypassing the administrative process, the United States Courts of Appeals for the Sixth Circuit, *Langford v. U.S. Army Corps of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir. 1988) adopts the first, and stronger, no-election/exhaustion position. *Langford* is in accord on this issue with decisions in the Eighth, *McIntosh v. Weinberger*, 810 F.2d 1411, 1425-26 (8th Cir. 1987) vacated and remanded on other grounds *sub nom. Turner v. McIntosh*, 487 U.S. 1212 (1988), Eleventh, *Ray v. Nimmo*, 704 F.2d 1480, 1484-1485 (11th Cir. 1983), and District of Columbia Circuits, *Proud v. U.S.*, 872 F.2d 1066, 1068-69 (D.C. Cir. 1989), *Kennedy v. Whitehurst*, 690 F.2d 951, 960-65 (D.C. Cir. 1982). These courts conclude that administrative proceedings under the ADEA are not a "pervasive and integral part of the overall scheme of enforcement", *Kennedy*, 690 F.2d at 964, and "that exhaustion of administrative remedies, even once they are initiated, is not required before filing a civil action in federal court", *Langford*, 839 F.2d at 1194. These conclusions are amply supported, as will be demonstrated at length hereafter, by the language and the legislative history of the Act.

The Court of Appeals for the Fifth Circuit in *White v. Frank*, 895 F.2d 243 (5th Cir. 1989) *cert. den.* ___ U.S. ___ 111 S.Ct. 232 (1990), has joined the Courts of Appeals of the Third, *Purtill v. Harris*, 658 F.2d 134, 138 (3rd Cir. 1981), *cert. den.*, 462 U.S. 1131 (1983), First, *Castro v. U.S.*, 775 F.2d 399, 404 (1st Cir. 1985) and Seventh Circuits, *McGinty v. Dept. of the Army*, 900 F.2d 1114, 1117 (7th Cir. 1990) and adopted the second, weaker, position reading

into § 15 the same strict exhaustion requirement as is imposed by § 717(c) of Title VII, at least where the administrative agency has accepted the claim for processing and the employee has made no attempt to pursue the alternate "notice of intent" option under § 15(d). The 9th Circuit has also spoken approvingly of this view, *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986) *cert. den.*, 481 U.S. 1050 (1987), *Limongelli v. Postmaster General of the U.S.*, 707 F.2d 368, 373 (9th Cir. 1983).⁵ In the instant case, the Fifth Circuit apparently took *Purtill* one step further and imposed its requirements on Petitioner even though his claim was rejected for processing, he had given a § 15(d) notice, and had awaited the final agency action on his unsuccessful attempt to file a § 15(b) complaint before proceeding to federal court.

The courts on both sides of the issue claim the regulations promulgated by the EEOC to implement § 15(b) support their respective positions, compare *Langford* at

⁵ Taking their lead from *Purtill*, these courts have relied largely on the similarities between § 15(b) of the ADEA, 29 U.S.C. § 633a(b) and the administrative remedial scheme of § 717(b) of Title VII, 42 U.S.C. §§ 2000e-16(b) to conclude, erroneously, that there was a congressional preference that federal employees pursue their ADEA claims as fully as possible through the administrative process, *Purtill*, 658 F.2d at 138 ("[a]bsent an indication of contrary congressional intent, we will not countenance circumventing the administrative process"), see also, *McGinty*, 900 F.2d at 1117, *White*, 895 F.2d at 243-44 (adopting *in toto* the holding of the district court, 718 F.Supp. 592, 596-97 (W.D. Tx. 1989)), *Castro*, 775 F.2d at 404. In fact, there is substantial evidence of "contrary congressional intent".

1195, (the fact that ADEA regulations exclude from adoption of Title VII regulations all reference to requiring final agency action prior to suit supports no need to exhaust) with the very strained reading of *McGinty*, 900 F.2d at 1116 (fact that *exceptions* to exhaustion requirement are not incorporated into ADEA regulations indicates EEOC intent to require exhaustion). The Second Circuit, in *dictum* in *Bornholdt v. Brady*, 869 F.2d 57, 63 (2nd Cir. 1989) suggests that a change in one of the regulations, 29 C.F.R. § 1613.513 (eliminating, with respect to lawsuits filed after November 30, 1987, a requirement that the agency continue processing the charge even if a civil action were filed) supports an exhaustion requirement for suits filed before November 30, 1987 but eliminates it for suits, like Petitioner's here, filed thereafter, *c.f. Langford* at 1195 (using the fact that the regulations both before and after November 30, 1987 contemplate the possibility that suit would be filed while the administrative process is still pending to underscore the absence of an exhaustion requirement.), see also Brief of Respondent in Opposition at 8, n.5 ("EEOC regulation 29 C.F.R. 1613.513 . . . assumes that a judicial complaint may properly be filed before the administrative process is complete"). *Langford's* is the more reasonable view of the regulations not only because it is the one the government itself endorses, but because neither of the other decisions account for the fact that the specified provisions are part of a larger regulatory scheme which deletes all requirements relating to exhaustion.

As previously noted, Petitioner's case is not completely on all fours with any of the cases cited. Petitioner actually did "await final action by [the] agency before

filing an action in federal district court", *White*, 895 F.2d at 244. If "exhaustion" is defined as simply letting the agency reach a final decision, regardless of grounds for that decision, Petitioner here has exhausted his administrative remedies in compliance with the requirements of *White*. See also, *Purtill*, at 138, and *Castro*, at 404. The statutory language and legislative history strongly support this reading.

However, at least in the Title VII context, "exhaustion" implies not simply achieving a final agency decision or default, but also having complied with procedural requirements as to timeliness so that the administrative agency was actually empowered to accept the complaint for processing on the merits, *Brown v. GSA*, 425 U.S. at 835, *Wade v. Sec. of Army*, 796 F.2d 1369, 1376 (11th Cir. 1986). In its mistaken reliance on a Title VII analogy, the Seventh Circuit in *McGinty* upheld the dismissal of the plaintiff's ADEA claim for failure to exhaust because, although the plaintiff had initiated her agency complaint process in a timely fashion, she failed to appeal the final agency decision on the merits to the EEOC within the time prescribed by the regulations, 29 C.F.R. §§ 1613.521, 1613.233, 900 F.2d at 1115-16 and 1118.⁶

⁶ Unlike the Petitioner here, Ms. McGinty had apparently made no attempt to give a specific § 15(d) notice of intent to file suit. The Seventh Circuit therefore did not consider whether or not the plaintiff would be entitled to the alternate route provided by § 15(d), see also *Loe v. Heckler*, 768 F.2d 409, 416 n. 15 (D.C. Cir 1985). However, those courts which have considered the issue directly, and the EEOC itself, have concluded that submitting a complaint concerning the discrimination complained of to the employing agency within 180 days

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Under the Title VII definition of exhaustion, Petitioner did, indeed, fail to exhaust administrative remedies, and it appears that it is this standard that the court of appeals held him to. The ADEA, however, does not require this. In fact, since Petitioner's default under § 15(b) lay at the very threshold of filing his claim, i.e., he waited for more than thirty days to contact his EEO counselor, he not only did not exhaust his § 15(b) remedies, he technically never invoked them in the first place and the need, if any, to exhaust them never arose. Under the applicable regulations, Petitioner's formal complaint was never accepted for processing at all: "The agency may accept the complaint for processing . . . only if: (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days . . . " 29 C.F.R. § 1613.214(a)(1)(i) (emphasis added).

The Fifth Circuit's holding that Petitioner's unsuccessful attempt to get his complaint processed administratively precluded him from going to court via § 15(d) is thus even more at odds with the statutory language than the Seventh Circuit's view in *McGinty*, where the plaintiff had actually gotten the administrative process started but had dropped the ball in midstream. Indeed, the Fifth Circuit's approach in this case is not only to require

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satisfies the § 15(d) notice requirement, Brief of Respondent in Opposition to Petition for Writ of Certiorari, at 6 n.8. *Ray*, 704 F.2d at 1484-85, *Purtill*, 658 F.2d at 138, *McIntosh*, 810 F.2d at 1425 n.6, see also *Davis v. Devine*, 736 F.2d 1108, 1114 (6th Cir. 1984) cert. den. 469 U.S. 1020.

exhaustion of remedies, once they are invoked, but also to impose a draconian election of remedies requirement which subordinates Petitioner's right to proceed pursuant to § 15(d) (with which he admittedly complied) to a default under § 15(b) that rendered his access to § 15(b) procedures void *ab initio*. If the ADEA made § 15(b) the only route to federal court (as its counter-part is under Title VII), this threshold failure might be preclusive, *Brown v. GSA*, 425 U.S. at 835. However, the ADEA prescribes an equally valid alternate route, § 15(d), specifically for people who do not or cannot use the § 15(b) route.

Petitioner submits that neither the statutory language and legislative history of the ADEA nor the prior decisions of this Court support even the exhaustion requirements imposed in *White*, *Purtill*, *Castro*, and *McGinty*, much less the preclusive election requirement imposed upon Petitioner in the instant case. Review of these decisions in light of the statute's own words, congressional intent and this Court's precedent must lead, Petitioner submits, to the conclusion that the outcome in *Langford* and the rationales articulated in that case and in *McIntosh*, *Kennedy* and *Ray* are the correct ones and that this Court should adopt a similar interpretation of § 15 of the Age Discrimination in Employment Act in this regard.

A. The Plain Language Of the Act Supports Not Binding Federal ADEA Claimants To A Strict Election Or Exhaustion Of Remedies.

On April 8, 1974, President Nixon signed into law the 1974 Amendments to the Fair Labor Standards Act, Pub.

L. 93-259, 93rd Cong. 2d Sess. (1974). Section 28 of this statute, 88 Stat. 74-75, reprinted in 1974 U.S. Code Cong. & Admin. News 55, 79-80, added a new § 15, 29 U.S.C. § 633a, to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* This section, a hybrid of the prior statutes prohibiting age discrimination in private employment, 29 U.S.C. §§ 621-626, and race, color, sex, religion and national origin discrimination in federal employment, 42 U.S.C. §§ 2000e-16, prohibited the federal government from discriminating against its own employees on the basis of age, *Lehman v. Nakshian*, 453 U.S. 156, 157 (1981). Section 15(a) of the new law, 29 U.S.C. § 633a(a), contained the general prohibitory language. Section 15(c), 29 U.S.C. § 633a(c) gave federal district courts jurisdiction to hear claims of employees under the new Act. The rest of § 15 created two distinct remedial options for federal employees who believe themselves to be the victims of prohibited age discrimination.

The first remedial option is an administrative remedy established pursuant to § 15(b) of the Act, 29 U.S.C. § 633a(b). This section gives the Equal Employment Opportunity Commission⁷ authority "to enforce the provisions of [§ 15(a)] through appropriate remedies" and directs the Commission to "issue such rules, regulations,

⁷ This was originally the Civil Service Commission. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 5 U.S.C.S. § 903 note, (1990), and 29 U.S.C. § 633a note, (1990), transferred these functions to the Equal Employment Opportunity Commission, with which agency those functions remain.

orders and instructions as it deems necessary and appropriate to carry out its responsibilities" under the Act. In addition, the Civil Service Commission is specifically directed to "provide for the acceptance and processing of complaints of discrimination in federal employment on account of age", ADEA § 15(b)(3), 29 U.S.C. § 633a(b)(3), *Lehma v. Nakshian*, 453 U.S. at 158. Pursuant to this directive, the Commission enacted the regulatory scheme that is now set forth at 29 C.F.R. §§ 1613.501-521. These regulations adopt, with certain crucial exceptions, the administrative enforcement scheme established by 29 C.F.R. §§ 1613.213-1613.421 for federal employees who consider themselves to be victims of race, color, religion, sex, or national origin discrimination in violation of § 717 of Title VII. In keeping with § 15(c), the Commission excluded from the age discrimination enforcement regulatory scheme, however, all provisions that could be construed as requiring a final agency decision or exhaustion of the administrative process as a necessary prerequisite to institution of a federal civil action for enforcement of a federal employee's ADEA rights, §§ 1613.513; 514; and 521. A federal employee who opts to complete the administrative procedure does, however, have access, if aggrieved by the outcome of the administrative process, to federal court for *de novo* consideration of his claims, 29 U.S.C. § 633a(c), see also *Nakshian*, 453 U.S. at 158 n.6, *Chandler v. Roudebush*, 425 U.S. 840 (1976).

The second remedial scheme is set forth in § 15(d) of the Act, 29 U.S.C. § 633a(d). Under this provision, a federal employee who believes himself to be a victim of age discrimination need only give notice, within 180 days of the alleged discrimination, of an intent to institute

such a civil action and then wait "not less than thirty days", during which time the prospective defendants may be notified of the claim and given a brief opportunity to eliminate the alleged unlawful practice. Once this is done, the statute permits the aggrieved employee to institute a civil action without further administrative disposition of his claim.

The only possible textual support in the ADEA for any election or exhaustion of remedies requirement is the language in § 15(d) that the 180/30 day notice is required "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission". This provision, unfortunately, is "a model of imprecision" *Kennedy*, 690 F.2d at 955, but its context indicates it is not to be construed preclusively.

Significantly, none of the courts of appeals that discuss at length why they impose an exhaustion requirement invoke this language to justify their conclusions, though the district court in *White v. Frank* does, 718 F.Supp. at 596. Most courts that have addressed this clause interpret it to mean that the § 15(d) special notice is required if and only if the employee has not filed a complaint or otherwise given notice directly to this employer, *Ray v. Nimmo*, 704 F.2d at 1484 ("by its own terms subsection (d) requires a notice of intent to sue *only* when the complainant has *not* filed a complaint with the Commission, see *Purtill v. Harris*, 658 F.2d at 138 [other citations omitted, first emphasis added]. . . . Thus, a plaintiff need not file such a notice prior to proceeding to federal court when the plaintiff has already proceeded through the EEOC complaint process"), see also, *McIntosh*, 810 F.2d at 1425, n.6. This interpretation is the

one most consistent with the rest of § 15(d) which specifies that the purpose of this notice is only to give prospective defendants notice of the claim and a brief opportunity to conclude it, something which filing or attempting to file a complaint with the agency also does, 704 F.2d at 1483-84 n.9. This does not "read § 15(b) out of existence" as the district court in *White* fears, 718 F.Supp. at 596. It simply acknowledges that § 15(b) agency adjudication is not required to get to federal court. Even if the language were to require allowing the administrative adjudicative process to run its course if invoked, it should not be construed as requiring Title VII-type preclusive exhaustion of that process since the ADEA does not impose that kind of duty on ADEA claimants or give the administrative process the crucial role with respect to ADEA claims that it plays in Title VII cases. This clause, at most, requires only what Petitioner here did: await the final determination of the agency that it would *not* accept his complaint for processing.

Even assuming, *per arguendo*, a preclusive reading of the introduction to § 15(d), it does not preclude a § 15(d) notice from being valid under the circumstances of the instant case. Where, as here, the § 15(b) complaint was untimely *ab initio* it should not even be considered a "complaint filed" within the meaning of the introductory language to § 15(d), since the agency, under the applicable regulations, §§ 1613.214(a)(1)(i), never accepted it as a "complaint" for processing or adjudication as such.⁸ To

⁸ As is set forth at p. 36, n.18 and p. 41, *infra*, this is, however, sufficient to fulfill the lesser office of "notice of intent" under the notice provision of § 15(d) provided it is done within 180 days of the alleged discriminatory act.

preclude use of the § 15(d) process by Petitioner under these circumstances would be thoroughly inconsistent with the statute's own stated purpose for making the § 15(d) bypass option available - to afford potential defendants a notice of the claim and give a brief (30 day) opportunity to correct the problem before the employee resorts to the civil action that § 15(c) gives him the right to file without any other administrative action on his claim.

On its face, therefore, § 15 clearly imposes no obligation on federal employees claiming age discrimination in employment to either exhaust the administrative remedies optionally available to them under § 15(b) or to make a preclusive election between the two different remedial schemes established by the Act.

B. The Legislative History Supports The Plain Language Of The Statute In Not Binding Federal ADEA Claimants to A Strict Election Or Exhaustion Of Remedies.

Section 15 of the ADEA was not enacted on a *tabula rasa*. Prior to taking up the prohibition of age discrimination in employment in the federal sector, Congress had acted to prohibit both age discrimination in employment in the private sector, 29 U.S.C. § 621 *et seq.*, and employment discrimination on the basis of things other than age in the federal sector, § 717, Title VII of the Civil Rights of 1964, as amended, 1972. Thus, when Congress turned its attention to prohibiting age discrimination in the federal sector, it had two rather different statutory schemes on which it could draw. It considered, but rejected, simply adopting either one of them as the exclusive method for

enforcement of the ADEA in the federal sector. Rather, as is revealed by an analysis of the process by which the final statutory language was arrived at, § 15 was drafted to give federal ADEA claimants non-exclusive access to the remedial options of both statutes.

In 1967, Congress had prohibited age discrimination in employment in the private sector by enacting the Age Discrimination in Employment Act of 1967, Pub. L. 90-202 90th Cong., 1st Sess. (1967) 81 Stat. 602 (now codified at 29 U.S.C. §§ 621-634). Part of the Fair Labor Standards Act, the ADEA vested primary enforcement responsibilities in the Secretary of Labor,⁹ 29 U.S.C. § 626, and adopted the FLSA's statute of limitations, 29 U.S.C. § 626(e)(1)¹⁰ and many of its enforcement measures, 29 U.S.C. § 626(b)¹¹. The only procedural prerequisite to an aggrieved private sector employee's filing a civil action to redress age discrimination was that, within 180 days of the alleged discrimination, he had to give "not less than sixty days notice of an intent to file such action", Pub. L.

⁹ The same reorganization plan that transferred the Civil Service Commission's duties under § 15, 29 U.S.C. § 633a, to the Equal Employment Opportunity Commission, n.7, *supra*, also transferred the Secretary of Labor's functions under this provision to that agency.

¹⁰ 29 U.S.C. § 255: Action must be initiated within two years from accrual of claim if violation is not wilful, three years if wilful.

¹¹ 29 U.S.C. §§ 211(b), 215, 216, 217 and 259, including the availability of liquidated damages in addition to actual back-pay.

90-202, § 7(d)(1), 81 Stat. 604.¹² There was no requirement that any administrative adjudication or decision precede filing suit.

Five years later Congress prohibited federal sector employment discrimination, but addressed only those forms of discrimination – race, color, religion, sex and

¹² In 1978, this section was amended to require the filing, within the same time frame as previously provided, of a "charge alleging unlawful discrimination" in lieu of a "notice of intent" 29 U.S.C. § 626(d). Concern over attempts by the courts to limit access by age discrimination victims to the courts had led the Senate to initially propose the elimination of the notice requirement altogether, S. Rep. No. 493, 95th Cong., 1st Sess. 12-13 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 504, 515-16; H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess., 12-13 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News at 533-34; 123 Cong. Rec. 34296 (1977) (Remarks of Sen. Williams). Of particular concern was the fact that the old "notice of intent" requirement implied that the employee had to say in so many words that it was his intent to actually file suit, and that this may have deterred people from giving the requisite notice, 124 Cong. Rec. 7882 (1978) (remarks of Rep. Quie). The change from "notice of intent" to "charge" thus appears to have been made to meet this concern, rather than to substantively alter the purpose of the notice or to unduly restrict the right of age discrimination claimants to take their cases to federal court, see also, 124 Cong. Rec. 8217 (1978) (remarks of Sen. Williams). Indeed, the conference report issued in connection with the statute makes it clear that the change from "notice of intent" to "charge" was not made to alter the basic purpose of the Act – to accord prospective defendants notice of and a brief opportunity to remedy claims of discrimination. The conference also specifically stated that the charge requirement was not to be considered a jurisdictional prerequisite and was to be subject to equitable modification, H.R. Conf. Rep. 950 at 12.

national origin – prohibited by Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C. §§ 2000e-2. As part of a comprehensive bill amending and updating the Civil Rights Act of 1964, Congress enacted a new section, § 717, 42 U.S.C. § 2000e-16, to address the problems of discrimination in federal employment. Section 717(a) substantively prohibited such discrimination by the federal government. Section 717(b) vested enforcement and rule making authority in the Civil Service Commission¹³, to “enforce the provisions of [§ 717(a)] through appropriate remedies.” Pursuant to this directive, the regulatory scheme set forth at 29 C.F.R. §§ 1613.201-1613.421 was enacted. These regulations make contact with an EEO counselor at the aggrieved employees’ own agency within thirty days of the discrimination (or a showing of good cause for failure to do so) the required first step in the administrative complaint process §§ 1613.214(a)(1)(i).

Section 717(c) granted any person dissatisfied with the final agency disposition of his or her claim the right to file a civil action in federal court to redress the discrimination. The statute itself specifically provided that the prerequisite to a § 717(c) action was that the administrative procedures set up under § 717(b) must have been pursued to a final decision level or have been pending with the agency for more than 180 days without a final decision. Unlike the scheme under the private sector ADEA, it was anticipated that federal Title VII claimants would be required timely to invoke, and thereafter to exhaust, an administrative adjudicative process, rather than simply timely to accord potential defendants notice

¹³ See Footnotes 7 and 9, *supra*.

and a brief opportunity for informal resolution prior to instituting suit.

On March 9, 1972 (the day after Congress finally passed the Title VII amendments that included the new § 717), Senator Bentsen, the leading congressional proponent of prohibiting age discrimination in federal employment, introduced a bill that would have done so simply by amending the definition of “employer” under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b), to include the federal government, S.3318, 92nd Cong., 2d Sess., 118 Cong. Rec. 7745 (1972), *Lehman v. Nakshian*, 453 U.S. at 166 n.14. No action was taken on this measure, however, and on May 4, 1972, Senator Bentsen introduced a revised version of this bill in the form of an amendment to Senate Bill S.1861, a set of proposed amendments to the Fair Labor Standards Act then pending in the Senate.¹⁴ Stating that he had revised his bill in order to give federal ADEA claimants the benefits of the recent Title VII amendments, Senator Bentsen proposed a statute identical to the newly enacted § 717 of Title VII, except that it prohibited only age discrimination and eliminated provisions relating to affirmative action efforts, S.1861, Amend. No. 1177, 92nd Cong., 2d Sess., 118 Cong. Rec. 15894-96, (1972) (remarks of Senator Bentsen and text of proposed amendment). This proposed language, which excluded the notice option of the private ADEA, was not adopted either.

¹⁴ Although this bill was passed by the Senate in 1972, it was not until 1974 that the final version was passed by both Houses of Congress and signed by the President.

Instead, when S.1861 and its proposed amendments were reported out of committee, the language of the proposed statute had been crucially altered, S. Rep. No. 842, 92nd Cong., 2d Sess., 93-94 (1972); 118 Cong. Rec. 24396 (1972). Rather than directly tracking either the private sector ADEA or the federal sector Title VII provisions, the new version of the proposed statute was a hybrid of the two statutes it derived from,¹⁵ according federal age discrimination claimants the benefit of the remedial schemes of both statutes.

Subsections (a) and (b) of the proposed statute were unchanged and continued to track the Title VII language, S. Rep. No. 842 at 93-94¹⁶. Subsection (c) of Senator Bentsen's proposed statute, which had previously been identical to § 717(c) of Title VII was, however, replaced with a new subsection (c) which contained the language

¹⁵ The fact that the prohibition of age discrimination in federal employment had its origins in, and remained connected to, the Fair Labor Standards Act is reflected not only by the fact that the provision was consistently considered and enacted as an FLSA amendment and not as an independent statute or a Title VII amendment, but also by express congressional statements that the statute is "a logical extension of the committee's decision to extend FLSA coverage to federal, state and local government employees." S. Rep. 842, 92nd Cong., 2d Sess 45 (1972); H.R. Rep. 913, 93rd Cong., 2d Sess. 40 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 2811, 2849.

¹⁶ In this respect, the measures used to protect federal employees under the ADEA are, indeed, "substantially similar" to those under Title VII, *Nakshian*, 453 U.S. at 167 n.15, 118 Cong. Rec. 24397 (1972), since they give ADEA claimants optional access to the administrative adjudication process established for Title VII claimants.

that ultimately was enacted into law as § 15(c) of the Age Discrimination and Employment Act, 29 U.S.C. § 633a(c), S. Rep. No. 842 at 94. This language specifically eliminated the requirement of § 717(c) that a federal civil action was permitted only after a final agency decision or default and replaced it with a general grant of district court jurisdiction, § 15(c), 29 U.S.C. § 633(c). In addition, a new subsection (d) was added, giving aggrieved federal employees the option of using a notice procedure, identical (in all but the length of notice required) to the notice procedure then established for private sector ADEA claimants. Compare the language of the ADEA as it was then in effect, § 7(d) and (d)(1) 81 Stat. 605:

(d) No civil action may be commenced by any individual under this Section until the individual has given . . . not less than sixty days notice of an intent to file such action. Such notice shall be filed -

(1) within one hundred eighty days after the alleged unlawful practice occurred. . . .

with § 15(d) as enacted in 1974, 29 U.S.C. § 633a(d):

(d) . . . no civil action may be commenced by any individual under this section until the individual has given not . . . less than thirty days notice of an intent to file such action. Such notice shall be filed within one hundred eighty days after the alleged unlawful practice occurred. . . .¹⁷

¹⁷ The 1978 change in § 7, 29 U.S.C. § 626, from a "notice" to a "charge" requirement was not made to § 15. However, that change was apparently made primarily to dispense with the

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The only further change to § 15 occurred in 1973, when Congress added the language (not found in § 717(b) of the Civil Rights Act) that became § 15(b)(3) mandating that the Commission "provide for the acceptance and processing of complaints of discrimination in federal employment on account of age," 29 U.S.C. § 633a(b)(3), S. Rep. 300, 93rd Cong., 1st Sess. 107 (1973). There is no direct comment concerning this change, see S. Rep. 300 at 56, but it clearly reinforces the view that § 15 gave federal ADEA claimants the maximum number of options. Section 15(b)(3) forestalls the possibility that the Commission would interpret the non-mandatory nature of § 15(b) procedures to allow dispensing with such a complaint procedure altogether. Nonetheless, § 15(d) was retained, so that avenue of relief remained available as well.

This legislative history compels the conclusion that, as the law plainly provides, federal courts would be allowed to consider the merits of federal employee ADEA claims under § 15(c) whether or not the federal employee had first presented his claim for adjudication in the administrative process under § 15(b). Rather, an aggrieved federal employee could avoid § 15(b) process

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possibility that § 7 notices could be deemed inadequate because they did not expressly state that a suit was contemplated, see n. 12, *supra*. Since Petitioner's notice [J.A. 15] does expressly state such an intent, the distinction is not relevant for purposes of the instant case *c.f.*, *Lehman v. Nakshian*, 415 U.S. 516, (failure to amend § 15 to permit jury trial at same time as private sector remedies were so amended *does* foreclose the possibility of jury trial under § 15).

by giving the same notice as an aggrieved private sector employee, waiting thirty days, and going to court under § 15(c) and (d) at any time thereafter. The statute and Congress do not express a preference for the § 15(b) process over the § 15(d) process, or vice versa. The statute simply gives employees the two options as co-equal avenues of relief.

This legislative history also amply reinforces reading the first clause of § 15(d) to permit a person whose § 15(b) complaint is rejected as untimely to take the § 15(d) route to federal court. It is clear that, in contrast to federal Title VII claimants, federal ADEA claimants were vested by Congress with the right to go to court notwithstanding any failure to comply with the regulatory requirements promulgated under § 15(b), including the regulatory requirement ultimately propounded as § 29 C.F.R. § 1613.214(a)(1)(i) that an EEO counselor must be contacted within thirty days of the discrimination in order to preserve the right to an administrative appeal. After all, a person who opts to go under § 15(d) by filing a notice of intent without trying to invoke the administrative procedures at all has by definition failed to comply with the counselor contact requisite of § 1613.214. Clearly this individual is entitled to use the § 15(d) method to go to court so long as he gives notice of intent within 180 days. It seems inconceivable that Congress intended the language of § 15(d) to be read as distinguishing an ADEA claimant whose § 15(b) default consists of never contacting an EEO counselor, and Petitioner here, whose § 15(b) default consists of contacting the EEO counselor too late and without good cause, but who timely filed a § 15(d) notice. These individuals are situated identically with

respect to § 15(b): both are equally foreclosed from getting their § 15(b) administrative complaints accepted or processed by the agency, § 1613.214(a)(1)(i). There is no basis for thinking that Congress intended that the statute would treat these two individuals as differently situated with respect to § 15(d). Neither of them had an administrative complaint accepted for filing and processing and both gave notice within 180 days of their notice of intent to sue.

Moreover, to read such a restrictive distinction into § 15 – especially where it would prevent access to the statutorily created § 15(c) and (d) process because of defaults that had nothing to do with § 15(c) and (d) process itself – would be inconsistent with Congress' general mandate regarding anti-discrimination legislation in federal employment:

[T]here can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector, H.R. Rep. No. 238, 92nd Cong. 2d Sess. (1972) *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2158.

This statement, made in the context of the debate and adoption of the Title VII Amendments in 1972, was incorporated and adopted as the guiding principle for ADEA protection in the federal sector as well, e.g., remarks of Senator Bentsen, 118 Cong. Rec. 15894-96 (1972). This is borne out by the fact that § 15 of the ADEA explicitly gave federal ADEA claimants an avenue to federal court nearly identical to that of their private sector counterparts. This avenue had been adopted deliberately, in order to facilitate rapid access to federal court by people

"to whom, by definition, relatively few productive years are left", 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

The statutory language and legislative history thus offer little support to the decisions requiring exhaustion in *Purtill*, *Castro*, *White*, *McGinty*, or *Limongilli*, much less the draconian election requirement imposed on the Petitioner here. Indeed, in the passage on which all the cases following *Purtill* rely, the *Purtill* court admitted that it was going beyond the express statutory language, but that it arrived at its conclusion that exhaustion would be required because it saw no indication of a congressional intent "contrary" to requiring exhaustion, 658 F.2d at 138. The express consideration and rejection by Congress of wording the ADEA identically to the passages of Title VII imposing an exhaustion requirement, and Congress' equally express decision to give federal sector age discrimination claimants a notice process identical to that of their private sector counterparts in addition to any administrative remedies, seems ample evidence of the "contrary congressional intent" that *Purtill* and its progeny could not find, *Purtill*, *id.* This legislative history was to a great extent found and relied on by the courts deciding *Langford*, *McIntosh*, *Ray* and *Kennedy* to support their interpreting the statute's plain language to not require exhaustion of administrative statute remedies. It is clear that this position is the one which is more strongly supported by the statutory language and legislative history and which should be adopted by this Court.

C. This Court's Guiding Principles In Interpreting Federal Anti-Discrimination Statutes Also Support Not Imposing A Stringent Election Or Exhaustion Requirement On Federal ADEA Claimants.

This Court has not previously addressed the interface between the two different remedial options accorded federal employee ADEA claimants under §§ 15(b) and 15(d) of the ADEA or the differing procedural routes – via agency administrative adjudication under § 15(b) or via notice of intent without adjudication under § 15(d) – these differing options prescribe for the filing of a civil action in federal district court pursuant to § 15(c) of the Act. It has, however, addressed related matters.

As a general principle, this Court has recognized and endorsed the broad remedial purposes of federal anti-discrimination legislation and has declined to impose unduly complicated or preclusive procedural barriers to obtaining federal court review on anti-discrimination claimants, many of whom are, at least at the initial stages, unrepresented by counsel, *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972), *Zipes v. Trans World Airlines*, 455 U.S. 385, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982).¹⁸ This Court has

¹⁸ This Court has now held that the equitable modification principles of *Zipes* are applicable to suits against the federal government under § 717(c) of Title VII, *Irwin v. Veterans Administration*, ___ U.S. ___, 59 U.S.L.W. 4021, 4023 (Dec. 3, 1990). Courts which have addressed *Zipes*' applicability to § 15 of the ADEA have either found it applicable to administrative deadlines thereunder, e.g., *Ray*, 704 F.2d at 1483, *Castro*, 775 F.2d at

(Continued on following page)

also been reluctant to hold discrimination victims to strict election-of-remedies requirements that deprive them of access to federal court for *de novo* consideration of their discrimination claims, *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), *Chandler v. Roudebush*, 425 U.S. 840 (1976). These considerations are particularly apropos in the instant case, where Petitioner without counsel [Pet. App., A-1, n.1], attempted to negotiate a multi-option bureaucratic labyrinth by doing something to preserve each of his possible avenues of relief. The court of appeals' decision in essence punishes him for this assiduous attempt to "cover all the bases."

Where a statute does not specifically prescribe an administrative process that needs to be exhausted, this Court does not hesitate to allow persons seeking judicial relief under federal statutes to forego exhaustion of voluntary administrative procedures where those procedures would be futile or inadequate to resolving the merits of their claims, *Coit Independence Joint Venture v.*

(Continued from previous page)

403 n.4 or assumed that it was, e.g., *McGinty*, 900 F.2d at 1118. This issue need not be decided in the instant case since Petitioner timely complied with all his § 15(d) deadlines and has abandoned any claims that his default under § 15(b) should be excused. The only divergence from the "letter of the law" in this case came when he filed his notice of intent with his own agency, rather than with the EEOC. However, the EEOC has, pursuant to its grant of regulation-making power under § 15(b)(3), designated the employing agencies as its agents for receipt of § 15(d) notices, *Purtill* at 138, Brief in Opposition at 6 n.4 and Petitioner has thus complied with the language of the statute, and does not require equitable relief from any filing obligation for his § 15(d) notice to be valid.

FSLIC, 489 U.S. 561 (1989), *Honig v. Doe*, 484 U.S. 305, 326-27 (1988); or where the underlying policy of the statute would be served without exhaustion, *Bowen v. City of N.Y.*, 476 U.S. 467, 485 (1986).

On a more specific level, this Court has had one occasion to construe the language of § 15 of the ADEA. In *Lehman v. Nakshian*, 453 U.S. 156, 158, this Court was called upon to decide whether or not § 15(c) allowed federal sector ADEA claimants the same right to a jury trial as is accorded their private sector counterparts by § 7(c) of the Act, 29 U.S.C. § 626(c) and this Court in *Lorillard v. Pons*, 434 U.S. 575 (1978). In *Nakshian*, this Court concluded that federal sector ADEA claimants did not have such a right because Congress did not specifically grant it to them under § 15(c) of the Act as it had under § 7(c), 453 U.S. at 167, and that the statute could therefore not be interpreted to override the longstanding principle of American jurisprudence that "the Seventh Amendment right to trial by jury in suits at common law does not extend to civil actions against the Federal Government", 453 U.S. at 175 (citations omitted). As this decision did not specifically address what the statute requires of ADEA claimants prior to reaching federal court, it is of limited usefulness in resolving the substantive problem presented here. Its attention to legislative history, however, provides precedent for a similarly scrupulous inquiry in the instant case, 453 U.S. at 166-68.

Some procedural aspects of the Title VII antecedent to § 15(b) were addressed by this Court in *Brown v. GSA*, 425 U.S. 820, and *Chandler v. Roudebush*, 425 U.S. 840 (1976). *Brown* found that § 717 was the exclusive remedy for federal employees claiming discrimination covered by

Title VII and held that compliance with the "rigorous administrative exhaustion requirements and time limitations" was required in order that the "crucial" role allotted by Congress to the administrative process under Title VII could be fulfilled, 425 U.S. at 833. Once again, it was very scrupulous review of the specific legislative history of the section that led the court to its conclusion, 425 U.S. at 827-29. Similar careful review of the legislative history of the ADEA makes it clear that the administrative option under § 15(b) is not mandatory and does not play the same sort of crucial role in ADEA enforcement as it does under Title VII, see *Kennerly v. Whitehurst*, 690 F.2d at 964.

Chandler v. Roudebush, 425 U.S. 840 also makes a careful study of the specific legislative history appropriate to Title VII, 425 U.S. at 848-61 and concludes that even though the administrative remedies play a crucial role and must be timely invoked and exhausted as set forth in *Brown*, aggrieved federal sector discrimination claimants are nonetheless entitled to the same *de novo* consideration of their claims by a federal court as private sector employees, 425 U.S. at 863. Petitioner submits that under the ADEA, where administrative remedies are neither mandatory nor crucial, *Chandler* requires that access to federal court be read as expansively as the statutory language permits.

Finally, this Court has had the opportunity to interpret a procedural aspect of § 15's other antecedent, the private sector provisions of the ADEA 29 U.S.C. §§ 626, 633. In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court construed the meaning of the notice requirement contained in § 14(b) of the ADEA, 29 U.S.C. § 633(b), a notice requirement that it is not dissimilar to

the notice requirement of § 15(d). Section 14(b) requires that private sector ADEA claimants commence proceedings with state agencies in states that have such agencies and wait sixty days thereafter before filing suit in federal court. There is no requirement that the claimant await a final action by the state agency. In *Oscar Mayer*, this Court construed § 14(b) to be, essentially, a notice requirement, and concluded that because § 14(b) "does not stipulate an exhaustion requirement" all the statute was meant to do was "to give. . . a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner", 441 U.S. 761. *Oscar Mayer* is therefore helpful in reiterating the underlying principle that ADEA claimants are accorded multiple options for an administrative resolution of their claims but are not held to an exhaustion requirement with respect to any of them. It also reinforces the view that when Congress requires only a notice under the ADEA, that is *all* that is required, and that nothing further should be read into the statute in that regard by the courts.

In light of the statutory language, legislative history and this Court's relevant precedent, Petitioner respectfully submits that § 15 of the ADEA is unambiguous in rejecting a requirement that federal employees with age discrimination claims must exhaust or be preclusively bound to an election of their § 15(b) administrative remedies. However, to the extent that there may be an ambiguity in the statutory language, the regulatory activity of the Equal Employment Opportunity Commission can be helpful and instructive. The fact that the EEOC did not, in the regulations it promulgated to implement § 15, contemplate requiring preclusive election of,

or exhaustion once they were invoked of, administrative remedies, §§ 1613.511, 513, 514, 521, weighs under this Court's established precedent heavily in favor of a non-preclusive, no-exhaustion reading of the statute.

This Court has long held that an agency's regulatory interpretation of the statute it is charged with enforcing even if not binding is ordinarily entitled to "considerable respect" as a guide to statutory construction, *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981), see also *Firefighters v. Cleveland*, 478 U.S. 501, 518 (1986). Indeed, if the regulations are promulgated under a specific grant of legislative authority, they must be deferred to so long as the interpretation is "not inconsistent with the statutory mandate [and does not] frustrate the policy that Congress sought to implement", *FEC v. Democratic Campaign Comm.*, 454 U.S. 27, 32 (1981), is "a permissible construction" of the statute, "rational and consistent with the statute", *Sullivan v. Everhart*, ___ U.S. ___, 110 S.Ct. 960 (1990) and represents a contemporaneous and consistent interpretation of the Act by the enforcing agency, *EEOC v. Assoc. Dry Goods Corp.*, 449 U.S. 590, 600 n.17, 66 L.Ed. 2d 762, 101 S.Ct. 817 (1981). Only if the regulatory interpretation is "at odds with the plain language of the statute itself" will the agency's interpretation be rejected, *Public Employees v. Betts*, 492 U.S. ___, ___, 106 L.Ed. 2d 134, 151, 109 S.Ct. 2854 (1989), see also *Atkins v. Rivera*, 477 U.S. 154, 162 (1986), *Chevron v. NRDC*, 467 U.S. 837, 844 (1984).

Section 15 is extremely "plain" in not conditioning the right to seek federal court relief in federal employee ADEA cases on obtaining a final agency action on an administrative complaint and in establishing a simple

notice procedure for getting to federal court without such final agency action. To the extent that the statute is not "plain", it is only with respect to whether or not the introductory clause to § 15(d) ("When the individual has not filed a complaint concerning age discrimination with the Commission. . . .") should be read as exclusive of other relief, *White v. Frank*, 718 F.Supp. at 596 (§ 15(d) available only if no § 15(b) complaint is filed) or as supplement to other types of relief, *Ray*, 704 F.2d at 1484 (§ 15(d) notice is necessary only if there has not been a § 15(b) complaint filed). Given that the statute goes on within the same section to expressly state that the only purpose of the § 15(d) notice is to make the alleged discriminator aware of its actions and to give it a chance to rectify the problem without a long administrative or judicial inquiry, it would seem that the *Ray* interpretation should be accepted even without reference to how the agency has handled this issue.

However, if this language is still deemed ambiguous, reference to the EEOC's interpretation of the meaning of this clause verifies that the non-exclusive interpretation of § 15 (b) is the correct one. It is clear that the EEOC supports a non-preclusive reading of § 15(d). Not only does it specifically craft its age discrimination regulations to dispense with all reference to final agency action or other exhaustion, it actually accepts agency § 15(b) complaint filings as § 15(d) notices, Brief in Opposition, p.6, n.4, *Purtill* at 138. This interpretation is clearly not "at odds with the statute" *c.f.*, *Betts*, 492 U.S. at ___, 106 L.Ed. 2d at 151-152. Rather, it is a rational and consistent interpretation of the Act, which is also fully consistent with the express statutory mandate, even if it is not the only

grammatically possible interpretation, *FEC v. Democratic Campaign Comm.*, 454 U.S. at 36-37.

To adopt an interpretation of § 15(d) so preclusive as to keep an employee who properly follows its procedural requirements out of court, simply because he also knocked at the door of administrative relief but was turned away, is inconsistent with both the Act and with judicial economy. While such an interpretation would save the federal courts from having to adjudicate this Petitioner's claim any further, the long term result would be to increase the number of federal employee ADEA claims that reach the federal courts unmediated by the administrative process. The ADEA clearly does not make invoking the administrative process mandatory. It must therefore be made as attractive as possible if employees are to take advantage of it. If ADEA claimants know that a failed effort to get their employer to adjudicate their claim will completely foreclose them from federal court action, it is unlikely that they will risk such a failure. Thus, considerations of judicial economy also dictate a non-preclusive reading of § 15(d), at least where, as here, the § 15(b) remedies do not afford an administrative adjudication of the claim on its merits.

CONCLUSION

The correction by this Court of the Fifth Circuit's misreading of the length of notice required under § 15(d), and resolution of the issues of election and exhaustion of remedies under § 15 of the ADEA will affect thousands of federal employees over the age of forty as well as the

hundreds of federal government agencies which employ them. Employer and employee alike are in need of, and entitled to, the guidance of this Court in defining what is and is not required to pursue a claim of age discrimination in federal court. The individual Petitioner before this Court should not, however, be lost from view. Charles Z. Stevens believes he was discriminated against by his employer and has done everything within his power to obtain an adjudication of the merits of that claim.

F. this Court to allow a clear misreading of a notice provision to keep Mr. Stevens from that adjudication, or to condone judicially reading into the ADEA the draconian exhaustion and election of remedies not warranted by the statute's plain language, would not just be prescribing a procedural hurdle for all federal age discrimination claimants that is not in the language of the statute. It would also be depriving this individual Petitioner, Charles Z. Stevens, the opportunity to be heard on the merits of his age discrimination claim, a right that Congress believed it was according him and other federal employees in 1974 when it extended the Age Discrimination in Employment Act to cover them, and which he has sought since 1987.

As set forth in the foregoing discussion, this Court has recognized that it is bound to interpret statutes so they are to the greatest extent possible consistent with their plain language and with what Congress intended them to be. Under these principles, this Court should not hesitate to hold that § 15 of the Age Discrimination in Employment Act by its plain language accords federal employees, like the Petitioner here, multiple non-preclusive routes to federal court review of their claims.

Petitioner respectfully submits therefore that the decision of the court of appeals affirming dismissal of his case should be reversed and this matter remanded for consideration on the merits of his age discrimination in employment claim.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES Z. STEVENS, III, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether petitioner has properly preserved his claim that he satisfied the prerequisites for filing a complaint in federal district court under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a(c).

2. Whether such an action is barred because petitioner's request for administrative relief under Section 633a(b) has been properly dismissed as untimely.

3. Whether petitioner satisfied the time limitations applicable to an action under Section 633a(c).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	1
Statement:	
A. Statutory and regulatory background	2
B. Facts and proceedings below	4
Summary of argument	8
Argument:	
I. Petitioner failed to preserve his claim that he is entitled to maintain a civil action under the ADEA, despite his tardy initiation of administrative review	11
II. Petitioner's delay in seeking administrative review of his claim of age discrimination does not preclude a judicial action based on that claim....	15
A. Petitioner exhausted the administrative remedies available to him	18
B. A federal employee who elects agency review of an age discrimination complaint need not exhaust his administrative remedies before bringing a civil action	23
III. Petitioner satisfied all timeliness requirements for bringing his civil action	29
Conclusion	31
Appendix	1a

TABLE OF AUTHORITIES

Cases:	Page
<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144 (1970) ..	11
<i>Agency Holding Corp. v. Malley-Duff & Associates, Inc.</i> , 483 U.S. 143 (1987)	30
<i>Astoria Federal Savings & Loan Assoc. v. Solimino</i> , No. 89-1895 (cert. granted Jan. 7, 1991)	16

IV

Cases—Continued:	Page
<i>Bowen v. City of New York</i> , 476 U.S. 467 (1986) ..	19
<i>Castro v. United States</i> , 775 F.2d 399 (1st Cir. 1985)	17, 21
<i>Chandler v. Roudebush</i> , 425 U.S. 840 (1976)	15
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	10, 28
<i>Coleman v. Nolan</i> , 49 Fair Empl. Prac. Cas. (BNA) 385 (S.D.N.Y. 1988)	30
<i>Demarest v. Manspeaker</i> , No. 89-5916 (Jan. 8, 1991)	11
<i>Department of Treasury, I.R.S. v. Federal Labor Relations Auth.</i> , 110 S. Ct. 1623 (1990)	11
<i>Duggan v. Board of Educ.</i> , 818 F.2d 1291 (7th Cir. 1987)	16
<i>FTC v. Grolier Inc.</i> , 462 U.S. 19 (1983)	11
<i>Harris v. Plastic Mfg. Co.</i> , 617 F.2d 438 (5th Cir. 1980)	14
<i>Kontos v. United States Dep't of Labor</i> , 826 F.2d 573 (7th Cir. 1987)	16
<i>Langford v. United States Army Corps of Engineers</i> , 839 F.2d 1192 (6th Cir. 1988)	17
<i>Larkin v. United Assoc. of Journeymen, Local 53</i> , 338 F.2d 335 (1st Cir. 1964)	14
<i>Marks v. Turnage</i> , 46 Fair Empl. Prac. Cas. (BNA) 382 (N.D. Ill. 1988)	17, 30
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	19
<i>McGinty v. United States Dep't of the Army</i> , 900 F.2d 1114 (7th Cir. 1990)	17, 19
<i>McKart v. United States</i> , 395 U.S. 185 (1969)	19, 20
<i>Nabors v. United States</i> , 568 F.2d 657 (9th Cir. 1978)	16
<i>Paterson v. Weinberger</i> , 644 F.2d 521 (5th Cir. 1981)	17
<i>Patsy v. Florida Board of Regents</i> , 457 U.S. 496 (1982)	23
<i>Purtill v. Harris</i> , 658 F.2d 134 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983)	17, 19, 21, 25, 26
<i>Ray v. Nimmo</i> , 704 F.2d 1480 (11th Cir. 1983)	17
<i>Robertson v. Methow Valley Citizens Council</i> , 109 S. Ct. 1835 (1989)	27

V

Cases—Continued:	Page
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982)	11
<i>Rosenfeld v. Department of the Army</i> , 769 F.2d 237 (4th Cir. 1985)	16
<i>Stevens v. Department of the Treasury</i> , No. 88-2012 (E.E.O.C. Mar. 30, 1988)	30
<i>Stillians v. Iowa</i> , 843 F.2d 276 (8th Cir. 1988)	16
<i>Sullivan v. Everhart</i> , 110 S. Ct. 960 (1990)	28
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977)	11
<i>Volyrakis v. M/V Isabelle</i> , 668 F.2d 863 (5th Cir. 1982)	14
<i>Wall v. United States</i> , 871 F.2d 1540 (10th Cir. 1989)	16
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	19-20, 26, 27
<i>Wiersema v. TVA</i> , 41 Fair Empl. Prac. Cas. (BNA) 1588 (E.D. Tenn 1986)	30
Statutes, regulations, and rules:	
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 <i>et seq.</i> :	
29 U.S.C. 633a (§ 15)	2
29 U.S.C. 633a(b)	2, 3, 13
29 U.S.C. 633a(c)	2, 4, 12, 16, 17, 23, 24, 29, 30
29 U.S.C. 633a(d)	<i>passim</i>
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	15
42 U.S.C. 2000e-16(c)	24
Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978), reprinted in 5 U.S.C. app. at 1155 (1982), and in 92 Stat. 3781 (1978)	2
Portal to Portal Act of 1947, 29 U.S.C. 255	6, 7
Rehabilitation Act of 1973, 29 U.S.C. 794a	16
28 U.S.C. 2401	30
42 U.S.C. 1981	30
29 C.F.R.:	
Pt. 1613, Subpt. E	3
Section 1613.213(a)	3
Section 1613.214(a)	19
Section 1613.214(a)(1)	3
Section 1613.214(a)(4)	3
Sections 1613.215-1613.222	3

VI

Regulations and rules—Continued:	Page
Section 1613.215 (a) (4)	19
Section 1613.231	3
Section 1613.233 (a)	3
Sections 1613.234-1613.235	4
Section 1613.281	27
Section 1613.281 (b)	24
Section 1613.281 (d)	24
Section 1613.282	27
Section 1613.511	3
Section 1613.513	27
Section 1613.514	27, 28
Section 1613.521	3
Pt. 1626:	
Section 1626.1	6
Section 1626.7	7
Fed. R. Civ. P.:	
Rule 12 (h) (3)	11
Rule 28 (a) (4)	14
Miscellaneous:	
54 Fed. Reg. (1989) :	
p. 45,750	30
p. 45,763	26
Management Dir. EEO-MD 107, ch. 12	29
R. Stern, E. Gressman & S. Shapiro, <i>Supreme Court Practice</i> (6th ed. 1986)	11

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1821

CHARLES Z. STEVENS, III, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A5-A8) is unreported. The decision of the district court (Pet. App. A1-A4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990, and was granted on November 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act of 1967, and of the regulations

(1)

promulgated by the Equal Employment Opportunity Commission thereunder, are set forth in the appendix to the petition (Pet. App. A9-A15).

STATEMENT

A. Statutory and Regulatory Background

Section 15 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, protects most federal employees who are at least 40 years old from personnel actions that discriminate on the basis of age. A protected federal employee who believes that he has suffered age discrimination in employment has two routes by which to seek relief. If the employee elects to seek direct judicial relief, he must, within 180 days of the allegedly discriminatory action, file with the EEOC a notice of intent to bring a civil action. After waiting at least 30 days (during which time the Commission informally attempts to conciliate the grievance), the employee may bring a civil action in an appropriate federal district court against his employer, the allegedly offending agency. 29 U.S.C. 633a(c) and (d).¹ The district court may award such legal or equitable relief as will effectuate the purposes of the Act. 29 U.S.C. 633a(c).

Alternatively, the employee may seek administrative relief, pursuant to 29 U.S.C. 633a(b). That subsection authorizes the EEOC "to enforce the provisions of subsection (a) * * * through appropriate reme-

¹ Although 29 U.S.C. 633a as reproduced at Pet. App. A9-A10 refers to the Civil Service Commission, the functions vested by this Section were transferred to the EEOC by Reorg. Plan No. 1 of 1978, § 2, 3 C.F.R. 321 (1978), reprinted in 5 U.S.C. app. at 1155 (1982), and in 92 Stat. 3781 (1978), and that agency is identified in the current U.S. Code provision.

dies," and directs the Commission to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities." 29 U.S.C. 633a(b). The EEOC has issued regulations detailing the administrative remedy available to aggrieved employees. See 29 C.F.R. 1613 Subpart E. To follow this route, the employee must consult with an Equal Employment Opportunity counselor at the employing agency within 30 days of the date he knew or reasonably should have known of the allegedly discriminatory action. The counselor will then make whatever inquiry is necessary and seek to resolve the matter on an informal basis. 29 C.F.R. 1613.213(a), 1613.214(a)(1).² If the counselor cannot resolve the matter informally, the employee may, within 15 days, file a formal complaint of discrimination with the employing agency. 29 C.F.R. 1613.213(a). The agency may accept complaints for processing only if the time limits have been met, or if the employee has good cause for being late. 29 C.F.R. 1613.214(a)(1) and (4). Once a formal complaint is filed, the employing agency considers and decides it pursuant to the procedures specified in 29 C.F.R. 1613.215-1613.222.

If the employee is dissatisfied with his agency's determination, he may appeal to the EEOC by filing a notice of appeal within 20 days after he receives notice of the agency's final decision. 29 C.F.R. 1613.231, 1613.233(a). On receipt of a timely notice

² These Sections appear in the part of the EEOC regulations applicable to Title VII complaints of discrimination based on race, color, religion, sex, or national origin. However, 29 C.F.R. 1613.511 and 1613.521 make these aspects of the Title VII complaint processing system applicable to the processing of age discrimination complaints.

of appeal, the EEOC Office of Review and Appeals reviews the complaint file and issues a decision that is final unless the Commission, upon motion or acting *sua sponte*, decides to reopen and reconsider the case. 29 C.F.R. 1613.234-1613.235. If the employee is still dissatisfied, he retains the statutory right to file a civil action in district court. 29 U.S.C. 633a(c).

B. Facts and Proceedings Below

Petitioner is an employee of the Internal Revenue Service. In August 1986, when he was 63 years old, he entered a Revenue Officer Training Program and assumed probationary status. On April 26, 1987, after being informed that his performance in the training program was unsatisfactory, petitioner chose to request a demotion and a transfer out of the training program, rather than face possible separation from service. Pet. App. A2. He wrote his Congressman on May 21, 1987, stating that the agency's conclusion that his performance was unsatisfactory reflected discrimination on the basis of his age. J.A. 8-10. Nevertheless, petitioner did not attempt to invoke the administrative procedures for resolving age discrimination complaints by seeking a meeting with an EEO counselor until September 1987, well beyond the 30-day period for instituting such procedures. Pet. App. A2. Dissatisfied with the results of that meeting, petitioner on October 19, 1987, filed a formal administrative complaint of age discrimination with the Treasury Department.³ J.A. 11-15. The

³ That complaint contained the following statement (J.A. 15):

This is also my notice of intention to sue in U.S. Civil District Court if the matter is not satisfactorily resolved.

complaint was rejected because of petitioner's delay in seeking a meeting with an EEO counselor, on the ground that he had no good cause for his tardiness. J.A. 16-19. Petitioner appealed to the EEOC. The EEOC Office of Review and Appeals affirmed the Treasury Department's rejection of petitioner's complaint as untimely, noting that petitioner's letter to his Congressman demonstrated that he knew of the alleged age discrimination at least by May 21, 1987. J.A. 20-21.

On May 3, 1989, petitioner filed a civil action against the Department of the Treasury in the United States District Court for the Western District of Texas. In his pro se complaint, petitioner stated that he "did not know of the procedures or a rule that required a charge to be lodged with an EEO Counselor within 30 days of an occurrence of age discrimination," and that the EEOC's actions "do not reflect the Congressional intent by limiting to 30 days the filing of a charge." J.A. 3, 5. The relief sought in the complaint included a demand that the "[d]efendants be required to treat the charges as timely filed." J.A. 6.

At a hearing on the merits, petitioner was represented by counsel. 3/29/89 Tr. 2. After petitioner presented his case, the government—apparently responding to the allegations in petitioner's complaint—moved to dismiss the action on the ground that petitioner had failed to establish any basis for tolling the 30-day time limit for contacting an EEO counselor. *Id.* at 79. Petitioner's counsel stated that "I think the law is that as long as notice is provided within a 180-day period, that he can bring suit at anytime by giving 30 days notice." *Id.* at 80, J.A. 22-23. In response to a comment from the district court questioning jurisdiction, however, petitioner's counsel stated that petitioner "sought counseling" and that

"prior to the EEO counselor actually granting him an interview, that he made several calls and attempted to set up appointments with EEO." 3/29/89 Tr. 81-82.⁴

After the conclusion of the hearing, the district court dismissed petitioner's complaint. It noted that there were "two avenues of relief under the ADEA." Pet. App. A3. First, as the district court saw it, the employee "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit. 29 U.S.C. Sec. 633a(d)." *Ibid.* Petitioner did not do this. The court therefore considered whether petitioner properly invoked the alternative administrative complaint procedure, and concluded that he had not, since he had neither invoked those procedures in a timely manner nor offered a satisfactory explanation for his failure to do so. *Id.* at A3-A4. Both routes were therefore blocked.

Petitioner appealed, arguing only that "the commission's action, in rejecting [petitioner's] complaint on the basis that it was untimely, is erroneous" because it failed to apply the time limitations for the Portal-to-Portal Act of 1947, 29 U.S.C. 255, as required by 29 C.F.R. 1626.1.⁵ Pet. C.A. Br. 3 (em-

⁴ Because this discussion appears to be the only time petitioner even arguably suggested the theory upon which he relies in this Court, we have reprinted petitioner's counsel's entire argument on this point in an Appendix to this brief. App., *infra*, 4a-5a. 1c - 3c.

⁵ The "QUESTION PRESENTED" in petitioner's court of appeals brief stated: "If an aggrieved party fails to file an administrative age discrimination complaint in the time frame of the general administrative provision of the Equal Employment Opportunity Commission (the 'Commission'), does such failure deprive a Federal District Court of Jurisdiction to hear a civil action filed under the Age Discrimination in

phasis supplied). Petitioner therefore concluded that "[s]ince * * * [petitioner] clearly filed a charge with the Commission within the time period allowed by 29 C.F.R. 1626.7, the trial court clearly had and continues to have the jurisdiction to decide the merits of this case." Pet. C.A. Br. 4 (emphasis supplied). Petitioner presented no argument to the court of appeals that the district court erred in its application of the 180-day and 30-day limits set forth in 29 U.S.C. 633a(d).⁶ The case was submitted on the briefs.

The court of appeals affirmed the dismissal. It began its analysis by noting that "Stevens argues that the district court erred in finding that Stevens failed to file a complaint with the *Equal Employment Opportunity Commission* ('EEOC') in a timely manner." Pet. App. A6 (emphasis supplied). Addressing that argument, the court agreed with the district court that petitioner's efforts to invoke his administrative remedies were fatally tardy.⁷ Pet.

Employment Act where a charge has been timely filed thereunder." Pet. C.A. Br. 1-2. The two-page argument section of the brief, however, was devoted exclusively to attempting to establish the timeliness of petitioner's filing with the Commission. See *id.* at 3-4. In light of the petitioner's argument, the government's responsive brief discussed only the question whether petitioner's administrative complaint was timely filed. Gov't C.A. Br. 6-9. It pointed out that the Portal-to-Portal Act of 1947 provisions on which petitioner relied apply only to private sector employees. *Id.* at 8-9.

⁶ We have reproduced as an appendix to this brief the entire argument section of petitioner's court of appeals brief. App., *infra*, 4a-5a.

⁷ It rejected petitioner's reliance on the Portal-to-Portal Act of 1947 time limitations for initiating administrative action as inapplicable to suits by federal employees. In this Court, petitioner expressly disavows any challenge to the dismissal of his administrative action as untimely. Pet. Br. 7.

App. A7-A8. The court went on to observe that Section 633a(d) requires the filing of the notice of intent to sue with the EEOC within 180 days of the alleged discrimination, not—as the district court believed—the filing of the civil action within that time.⁸ The court of appeals correctly observed that this requirement was satisfied by petitioner's statement in his October 19, 1987 administrative complaint that he would seek judicial review if the complaint was not resolved to his satisfaction administratively. See J.A. 15. But the court then stated, without further explanation, that because petitioner did not file his civil action until May 1988, his October 1987 notice "was not effective." Pet. App. A7.

SUMMARY OF ARGUMENT

The court of appeals correctly decided the question it was asked to decide: whether petitioner's request for administrative relief under the Age Discrimination in Employment Act of 1967 was timely. It was not, and petitioner no longer contends that it was. Pet. Br. 7. The court of appeals erred in its discussion of the question petitioner now asks this Court to decide: whether petitioner's civil action in district court under the ADEA was timely. Pet. Br. i. It was. Because petitioner did not properly present this latter question below, and because his failure to do so may well have contributed to the lower court's error and the ambiguous treatment of the issue below, this

⁸ The court of appeals did not mention the district court's other error in interpreting Section 633a(d): its reading of the requirement that suit be filed "not less than thirty days" after notice to the EEOC as meaning that suit had to be filed *within* 30 days of notice. Pet. App. A3.

Court should not address that question for the first time.

1. This case presents no extraordinary circumstances justifying a departure from this Court's usual practice of not addressing issues that have not been properly preserved. Instead, it demonstrates the wisdom of that procedure. Had petitioner addressed the applicability of the provisions of the ADEA authorizing the filing of a civil action in district court, it is unlikely that the courts below would have misread the requirement that the EEOC receive no less than 30 days' notice of the complainant's intent to sue. At the very least, the basis for the court of appeals' decision would have been clarified, thus facilitating review by this Court. Instead, petitioner never raised the question of the district court's treatment of the time limits set forth in 29 U.S.C. 633a(d)—the basis for the questions now presented to this Court. Indeed, petitioner never once quoted from or even *cited* Section 633a(d) in his entire court of appeals brief.

If this Court nevertheless concludes that the merits of petitioner's current claim are ripe for review, we agree with petitioner's assertion that he was entitled to maintain his age discrimination action in district court.

2. a. Application of the policies underlying the doctrine of exhaustion to the ADEA's administrative scheme shows that petitioner in fact exhausted such remedies as were available to him before commencing his civil action. The policies underlying exhaustion doctrine include (1) avoidance of improper judicial interference with pending administrative processes, and (2) affording an agency the first chance to rule on the merits of a case before it comes before a court. In this case, petitioner did not seek judicial relief

during the pendency of the administrative process, and so policies of the first sort are inapplicable. Policies of the second sort are inapplicable because Congress has expressly provided in the ADEA that federal employees may seek judicial relief for their age discrimination complaints without first seeking administrative relief. Accordingly, petitioner should be held to have exhausted his administrative remedies despite his tardy invocation of the administrative process.

b. Even if petitioner failed to exhaust his administrative remedies, he would still be entitled to seek judicial relief, because the ADEA provides alternative, independent routes for the review of age discrimination complaints by federal employees. Unlike Title VII, the ADEA contains no express or implicit exhaustion requirement, and none is contained in the EEOC's implementing regulations. Indeed, those regulations indicate that there is no exhaustion requirement, and they are so interpreted by the EEOC. That interpretation is at least a reasonable reading of the ADEA, and is entirely consistent with the statutory purpose of providing for speedy resolution of age discrimination claims by federal employees. The interpretation of the EEOC—the agency responsible for implementing the federal sector ADEA requirements—is therefore entitled to judicial deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. If petitioner were seeking direct judicial review of his age discrimination complaint, he met all timeliness requirements applicable to such a suit. He notified the EEOC of his intent to file a civil action within 180 days of the allegedly discriminatory event, and he then waited at least 30 days before

bringing the action. He filed the action within any statute of limitations that might apply to the case.

ARGUMENT

I. PETITIONER FAILED TO PRESERVE HIS CLAIM THAT HE IS ENTITLED TO MAINTAIN A CIVIL ACTION UNDER THE ADEA, DESPITE HIS TARDY INITIATION OF ADMINISTRATIVE REVIEW

We argued in opposition to the petition for certiorari that the issues petitioner presents to this Court were not properly preserved below. Br. in Opp. 5-7. We recognize that this Court's customary refusal to consider issues not so preserved is a prudential, rather than a jurisdictional rule. See *Demarest v. Manspeaker*, No. 89-5916 (Jan. 8, 1991), slip op. 4; *Department of Treasury, I.R.S. v. Federal Labor Relations Auth.*, 110 S. Ct. 1623, 1630 (1990); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 363-368 (and cases there cited). We nevertheless continue to believe that this case does not present exceptional circumstances justifying a departure from that practice.⁹

Petitioner's argument in this Court is that he complied with the timing requirements for filing suit

⁹ Although a claim that a court *lacks* jurisdiction may be raised at any time (Fed. R. Civ. P. 12(h)(3)), there is no similar rule permitting the assertion of a claim that a court *had* jurisdiction on a previously unclaimed basis.

under 29 U.S.C. 633a(c) and (d), because he afforded the EEOC notice of his intent to sue within 180 days of the alleged discriminatory action and at least 30 days before filing suit. The district court committed two errors: it assumed that suit had to be filed within 180 days of the discriminatory act, and that notice had to be given within 30 days of suit. Pet. App. A3. The court of appeals corrected the first error, *id.* at A7, but apparently not the second. But petitioner never asked it to. His entire argument before the court of appeals was directed to an entirely different issue: whether petitioner's invocation of the *administrative* route for relief was timely. The time limits petitioner now says are at issue are set forth in 29 U.S.C. 633a(d), yet that provision was never quoted or even cited in petitioner's brief before the court of appeals.¹⁰ Instead, petitioner's only argument was that he timely "filed a charge *with the Commission*" and that "the *commission's* action, in rejecting [petitioner's] complaint on the basis that it was untimely, is erroneous." App., *infra*, 4a (emphasis supplied). As the court of appeals properly recognized, petitioner's argument was that he "file[d] a complaint with the *Equal Employment Opportunity Commission* ("EEOC") in a timely manner." Pet. App. A6 (emphasis supplied). Section 633a(d)—the provision on which petitioner now relies—has nothing to do with the timeliness of complaints filed with the EEOC; it applies "[w]hen the individual has not filed a complaint concerning age discrimination with the Commission." 29 U.S.C.

¹⁰ The provision is cited more than 50 times in petitioner's brief before this Court.

633a(d); see 29 U.S.C. 633a(b) (provisions for administrative relief).¹¹

Given that petitioner had nothing to say in the court of appeals about the time requirements of 29 U.S.C. 633a(d)—*even though the district court's ruling was based on them*, see Pet. App. A3—it is perhaps not surprising that the court of appeals failed fully to correct the district court's misinterpretation of that provision. It seems unlikely that the courts would have persisted in the misreading of the 30-day notice requirement as requiring the filing of the civil complaint *within* 30 days of notice to the EEOC, rather than *no sooner than* 30 days after such notice, if petitioner had brought this error to their attention, even in a petition for rehearing. Instead, petitioner asserts for the first time in this Court that he is relying on the provisions of Section 633a(d), and asks this Court to correct the rather obvious—but under petitioner's previous theory of his case insignificant—error of the lower courts in

¹¹ Petitioner's theory before the district court can best be described as unclear. The complaint included as attachments the administrative complaint and the agency and EEOC decisions rejecting that complaint as untimely, suggesting that petitioner sought review of that determination. In addition, the complaint expressly challenged the rule requiring contact with an EEO counselor within 30 days, and sought an order that "[d]efendants be required to treat the charges as timely filed." J.A. 5, 6. At the district court hearing, petitioner's counsel stated his view that suit could be filed anytime by giving 30 days notice, but then went on to respond to a question concerning jurisdiction by discussing petitioner's efforts to seek EEO counseling—efforts that are pertinent only to the administrative route. App., *infra*, 2a-3a. In any event, the argument before the court of appeals was strictly limited to the timeliness of petitioner's invocation of administrative relief. *Id.* at 4a-5a.

interpreting that Section. This Court does not sit to save petitioners from the results of their litigating errors in the lower courts.

Petitioner's other claim, that the courts misconceived the relationship between the administrative and the direct judicial review procedures of the ADEA, further illustrates the basis for the Court's prudential rule. Petitioner's failure to assert his current theory of his case has deprived this Court of the assistance of the consideration of that theory by the lower courts on an adequate record. The court of appeals had no occasion to consider the relationship between the two avenues for relief under the ADEA because petitioner's argument was concerned only with establishing that he timely invoked the administrative route. The utility of briefing and argument below in clarifying and focusing matters for disposition by this Court is obvious.¹² There has been no such consideration here, and the rationale for the appellate court's conclusion that petitioner's notice of intent to sue was "not effective" remains unclear. Petitioner asks this Court to consider de novo the merits of a position that he never articulated to the court of appeals, and to reverse the judgment of that court on a ground it was never afforded an opportunity to consider.¹³

¹² Even if petitioner's statement of the issue presented in his court of appeals brief comprehends the issue he now presents to this Court (see note 5, *supra*), his failure to present any argument whatever in support of that statement means that he did not preserve it on appeal. *Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980); *Volyrakis v. M/V Isabelle*, 668 F.2d 863, 865 n.1 (5th Cir. 1982); *Larkin v. United Assoc. of Journeymen, Local 53*, 338 F.2d 335, 336 (1st Cir. 1964). See Fed. R. Civ. P. 28(a)(4).

¹³ Petitioner's objection to the "implicit ruling of the court of appeals" regarding the relation between the administrative

For these reasons, we submit that, far from constituting the exceptional case warranting a departure from this Court's usual practice of refusing to consider issues not properly raised below, this case is a prime example of the wisdom of that practice. Nevertheless, this Court's grant of the petition indicates that it has, at least initially, determined that the issues petitioner presents are ripe for plenary review. Accordingly we will presume for the balance of the brief that petitioner sufficiently asserted in the courts below not simply that he timely invoked his administrative remedy, but also that he satisfied all the time limits applicable to a civil action in district court, and that he may maintain such an action despite his failure to initiate his request for administrative review in a timely manner.

II. PETITIONER'S DELAY IN SEEKING ADMINISTRATIVE REVIEW OF HIS CLAIM OF AGE DISCRIMINATION DOES NOT PRECLUDE A JUDICIAL ACTION BASED ON THAT CLAIM

Although this Court has never expressly considered the matter, it seems clear that a federal employee who has exhausted his administrative remedies is entitled to de novo judicial consideration of his age discrimination complaint. This Court has recognized that federal employees have that right under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, *Chandler v. Roudebush*, 425 U.S. 840 (1976). The similarities between Title VII and the ADEA strongly suggest that Congress intended federal employees to have the same right to

and direct review procedures (Pet. Br. 7) and his objection to what the court "may have" done (Pet. Br. 10) point up this difficulty: the ruling was "implicit" precisely because petitioner failed to present the issue to the court.

de novo judicial consideration of their age discrimination complaints as they have with regard to Title VII complaints, and the circuit courts that have addressed the issue have consistently so held. *Kontos v. United States Dep't of Labor*, 826 F.2d 573, 575 n.4 (7th Cir. 1987); *Rosenfeld v. Department of the Army*, 769 F.2d 237 (4th Cir. 1985); *Nabors v. United States*, 568 F.2d 657 (9th Cir. 1978).¹⁴

At the same time, nothing in the ADEA—in sharp contrast to Title VII—requires resort to administrative processes prior to seeking judicial relief. Section 633a(c) simply provides that any person aggrieved may bring a civil action, and the notice requirement of Section 633a(d) expressly contemplates situations in which an individual files a civil action without first filing a complaint with the EEOC. The

¹⁴ This Court recently granted certiorari in *Astoria Federal Savings & Loan Assoc. v. Solimino*, No. 89-1895 (cert. granted Jan. 7, 1991), to resolve a conflict in the circuits over whether, in a federal court action under the ADEA, state agency findings of fact that have not been judicially reviewed have preclusive effect. Compare *Stillians v. Iowa*, 843 F.2d 276 (8th Cir. 1988) (preclusive effect) with *Duggan v. Board of Educ.*, 818 F.2d 1291 (7th Cir. 1987) (no preclusive effect). In recommending that the Court grant the petition, we took the position that, in light of the ADEA statutory scheme, preclusive effect should not be given. In addition, one circuit has held that a federal district court cannot give de novo consideration to a federal employee's age discrimination claim previously considered by the Merit Systems Protection Board in the context of a protest of his termination from government employment. *Wall v. United States*, 871 F.2d 1540 (10th Cir. 1989). That opinion turns on the specific statutory provisions under which the MSPB acted, not on the ADEA. See 871 F.2d at 1544 (Seymour, J., dissenting on the ground that the ADEA and the Rehabilitation Act of 1973, 29 U.S.C. 794a, dictate a different result).

courts have accordingly ruled that there is no requirement that a claimant seek administrative relief before seeking judicial relief pursuant to Section 633a(c).¹⁵

The circuit courts are divided, however, on the question of what happens if an employee does choose to seek administrative relief, and then either (1) abandons the process and goes to court while administrative proceedings are still pending, or (2) goes to court after failing to take a timely administrative appeal of an adverse initial agency decision. The Sixth Circuit has ruled that an employee may file the civil action authorized by 29 U.S.C. 633a(c) regardless of the pendency of any administrative proceeding, *Langford v. United States Army Corps of Engineers*, 839 F.2d 1192 (1988), but other circuits have held that an employee who elects to pursue administrative remedies must then exhaust them, in a timely fashion, before going to court. *McGinty v. United States Dep't of the Army*, 900 F.2d 1114 (7th Cir. 1990) (employee's failure to take timely EEOC appeal of adverse agency decision required dismissal of civil action); *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985) (employee's withdrawal of administrative complaint required dismissal of civil action); *Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981) cert. denied, 462 U.S. 1131 (1983) (employee's abandonment of pending agency appeal required dismissal of civil action). But no court has explicitly held that an employee's election

¹⁵ See, e.g., *Castro v. United States*, 775 F.2d 399, 403 (1st Cir. 1985); *Ray v. Nimmo*, 704 F.2d 1480, 1483 (11th Cir. 1983); *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981), cert. denied, 462 U.S. 1131 (1983); *Paterson v. Weinberger*, 644 F.2d 521, 523-524 (5th Cir. 1981); *Marks v. Turnage*, 46 Fair. Empl. Prac. Cas. (BNA) 382, 384 (N.D. Ill. 1988).

of administrative remedies somehow bars judicial relief (nor do we believe that the court below intended to so hold implicitly); rather, the question dividing the circuits is whether an employee's election of administrative remedies imposes an exhaustion requirement on the employee before he may seek judicial relief.

As noted in our opposition to certiorari (Brief in Opp. 8), we do not believe that this case presents that conflict. Although petitioner was not required to pursue administrative remedies at all, he fully exhausted that avenue of relief, and obtained a final decision that no relief was available to him from that route. If the Court nonetheless concludes that petitioner failed to exhaust his administrative remedies, we believe that such failure should not preclude a subsequent judicial action filed in compliance with 29 U.S.C. 633a(d). Petitioner met the prerequisites of that provision.

A. Petitioner Exhausted the Administrative Remedies Available to Him

Petitioner sought administrative resolution of his age discrimination complaint when he notified an EEO counselor of his grievance and then submitted a formal administrative complaint to the Treasury Department. However, because he did not contact the counselor until more than 30 days after he knew of the allegedly discriminatory action and was unable to demonstrate any good cause for this delay, petitioner's complaint was rejected. The EEOC's regulations provide that when an employee files a formal complaint with the employing agency, "[t]he agency may accept the complaint for processing * * * only if: (i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter

causing him/her to believe he/she had been discriminated against within 30 calendar days of the alleged discriminatory event * * * or the date that the aggrieved person knew or reasonably should have known of the discriminatory event." 29 C.F.R. 1613.214(a). Because of petitioner's tardiness, his formal complaint was rejected in accordance with 29 C.F.R. 1613.215(a)(4). Petitioner then timely appealed to the EEOC, which affirmed the Treasury Department's action.

Petitioner did not go to federal court while his administrative claim was pending before the EEOC (as did the employee in *Purtill v. Harris*, *supra*), nor did he permit an intermediate agency determination to become final through his failure to seek further administrative review (as did the employee in *McGinty v. United States Dep't of the Army*, *supra*). Rather, after his tardy attempt to invoke the EEOC's procedures was rebuffed, he pursued his available administrative appeals, and went to court only after the EEOC's final determination that it was unable to give him any administrative relief.

This Court has made clear that there is no mechanical test for determining whether a party to an action in federal court has exhausted his administrative remedies. Rather, "application of the exhaustion doctrine is 'intensely practical.'" *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). A court applying the exhaustion doctrine must have "an understanding of its purposes and of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. 185, 193 (1969); accord *Bowen*, 476 U.S. at 484; *Weinberger v. Salfi*,

422 U.S. 749, 765 (1975).¹⁶ In determining whether petitioner exhausted his administrative remedies, this Court must therefore look to the purposes of the exhaustion doctrine, and to the nature of the administrative scheme created by the relevant provisions of the ADEA.

McKart discusses the purposes of the exhaustion doctrine. Requiring the exhaustion of administrative remedies prevents premature interruption of the administrative process, 395 U.S. at 193, allowing an agency to develop the necessary factual background upon which its decisions should be based, and affording the agency the first chance to exercise its discretion or apply its expertise. *Id.* at 194. The requirement also promotes both administrative efficiency and agency autonomy by allowing the administrative process to go forward without interruption at intermediate stages, and by giving the agency a chance to discover and correct its own errors. *Id.* at 194-195. The exhaustion requirement furthers judicial efficiency by allowing the agency to create a record for judicial review, and by eliminating the need for courts to hear cases in which a complaining party could have obtained relief in the administrative process. *Id.* at 195. Finally, the requirement avoids the risk that agency effectiveness will be impaired by frequent and deliberate flouting of its administrative processes. *Ibid.*

Many of these purposes are simply not relevant where, as here, the complaining party goes to court

¹⁶ *McKart* involved the question of whether a party was required to exhaust administrative remedies; *Bowen*, *Salfi*, and *Eldridge* involved the question of whether a party had fulfilled an exhaustion requirement. However, the policy concerns cited in all the cases are similar.

only after obtaining a final agency decision denying him relief. Allowing petitioner's civil action to proceed could not implicate any of the purposes of the exhaustion doctrine that concern improper interruption of or interference with agency processes; those purposes would be implicated only by a case in which a party goes to court even though potential avenues for achieving administrative relief remain open to him. Petitioner's civil action would not interrupt any agency process, would not imperil administrative efficiency, and would not affect agency autonomy.

This case is, therefore, different from cases holding that a person who invokes the EEOC's administrative process cannot bring a civil action until the EEOC process is complete. In those cases, the courts reasoned that "[a]llowing a plaintiff to abandon the administrative remedies he has initiated would tend to frustrate the ability of the agency to deal with complaints. All participants would know that at any moment an impatient complainant could take his claim to the court and abort the administrative proceedings." *Purtill v. Harris*, 658 F.2d at 138; accord *Castro v. United States*, 775 F.2d at 404. Here, petitioner did not prematurely abandon the administrative process, but pursued it to its conclusion.

Accordingly, if petitioner's civil action is barred because of his failure to exhaust his administrative remedies, it must be because the affected agencies should have a first chance to rule on the merits of his case before the case goes to court—because those agencies should have a first chance at applying their expertise or exercising their discretion, or should have the chance to build the record necessary to their decision, or because insisting that parties go to the agencies first will avoid the need for judicial consid-

eration of cases that could be administratively resolved. With regard to these purposes of the exhaustion doctrine, however, Congress has spoken clearly in the ADEA. A federal employee complaining of age discrimination does not have to seek relief from his employing agency or the EEOC *at all*; he can decide to present the merits of his claim to a federal court in the first instance. See 29 U.S.C. 633a(d) (notice requirement for civil action when no complaint filed with EEOC). Congress apparently believed that other considerations outweighed the desirability of requiring that the agencies should always be given the first opportunity to consider a federal age discrimination case, and of sparing the federal courts from dealing with federal age discrimination cases that could perhaps be administratively resolved. And the building of an administrative record is not a weighty concern in these cases, because judicial review is *de novo*. Accordingly, it would be inconsistent with the statutory policy to deny petitioner the opportunity to bring his civil action in the name of serving these purposes of the exhaustion doctrine.¹⁷

¹⁷ Indeed, since the ADEA allows complaining parties to seek judicial relief without first seeking agency relief, to hold that a tardy agency complaint permanently bars judicial relief could only *disserve* the purpose of encouraging administrative resolution of claims. In light of such a holding, a person who had an age discrimination complaint against the federal government as to which the 30-day time limit for consulting an EEO counselor had expired would be foolish to bring his claim to the agency, even if he believed he had good cause for extension of the time limit. If the agency ultimately found his complaint to be tardy, all relief would be closed to him. Such a person would therefore be forced to bring his case directly to court, and the courts would be burdened with a case that might have been administratively resolved.

Although a party's failure to meet administrative deadlines is often treated as a failure to exhaust administrative remedies, petitioner's tardy attempt to invoke an administrative process that he was not required to invoke at all does not implicate any of the policy concerns that underlie the exhaustion doctrine. Accordingly, that doctrine should not prevent petitioner from maintaining his civil action against the Treasury Department.

B. A Federal Employee Who Elects Agency Review Of An Age Discrimination Complaint Need Not Exhaust His Administrative Remedies Before Bringing A Civil Action

If this Court finds that petitioner did not exhaust his administrative remedies, it will be necessary to decide whether a federal employee who invokes the EEOC's administrative process with a complaint of age discrimination must exhaust that process before filing the civil action authorized by 29 U.S.C. 633a(c). It is on this question that the lower courts are divided.

Although "courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided[,] * * * the initial question whether exhaustion is required should be answered by reference to congressional intent." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 501 (1982). In this case, the best indicator of congressional intent lies in a comparison of the statutory provisions regarding civil actions by federal employees under the ADEA and under Title VII.

A federal employee who claims to have suffered employment discrimination on the basis of race, color,

sex, religion, or national origin must seek relief through the EEOC's administrative process before going to court, for Title VII authorizes the filing of a civil suit only after the administrative process has been invoked. 42 U.S.C. 2000e-16(c). However, under Title VII, a federal employee who has filed a formal complaint of discrimination with the employing agency may file a civil action after 180 days if the agency has not reached a decision on the complaint. A federal employee may also file a civil action after 180 days from the filing of an appeal with the Commission, if the Commission has not reached a decision. *Ibid.*; 29 C.F.R. 1613.281(b) and (d).

The provision granting the right to file civil actions under the ADEA is significantly different. It is not conditioned on the complainant's having taken any particular steps towards seeking administrative relief. Section 633a(c) of Title 29 simply states that any aggrieved person may file a civil action in a federal district court of competent jurisdiction. The only statutory precondition for this action—Section 633a(d)'s requirement that the employee give the EEOC notice within 180 days of the discriminatory act and at least 30 days before suit—is unrelated to the processing of an agency complaint. Indeed, Section 633a(d) expressly contemplates the filing of suit by an employee who “has not filed a complaint concerning age discrimination with the Commission”—provided the 30-day notice is given. There is, therefore, no statutory requirement that a request for administrative relief precede the filing of a civil action.

This difference between Title VII and the ADEA strongly suggests that Congress did not intend age discrimination complaints to be subject to an exhaustion requirement. Indeed, a contrary holding would mean that although federal employees who complain

of discrimination based on race, color, sex, religion, or national origin are guaranteed the right to file a civil action 180 days after filing their agency complaints, federal employees who complain of age discrimination—and who elect to seek administrative relief—would be obliged to await an agency decision on their complaints, no matter how long the agency might take. Since age discrimination complainants presumably have a somewhat more limited amount of time within which to obtain relief if it is to be meaningful, Congress could hardly have intended to leave them helpless if the relevant agencies are unable to move expeditiously on their complaints, while guaranteeing the right to seek judicial relief within 180 days to those who file complaints of discrimination on the basis of race, color, sex, religion, or national origin. Nor would it make sense to say that because age discrimination complainants have the option of going directly to court, they assume the risk of indefinite agency inaction by electing to file an administrative rather than a civil complaint. Surely by providing dual avenues of relief, Congress intended to increase, not decrease, a complainant's chances of obtaining swift relief.

It is true, as the Third Circuit observed in *Purtill v. Harris*, 658 F.2d at 138, that provision for suit in the event of agency inaction is “[c]onspicuously absent” from the ADEA; this led that court to conclude that age discrimination complainants must wait until their administrative complaints are resolved before going to court.¹⁸ However, also conspicuously absent

¹⁸ The EEOC is considering the issuance of regulations that would fill this statutory gap by providing that an individual who files an administrative ADEA complaint may—like the Title VII complainant—file a civil action after 180 days if the

from the Act is a requirement that complainants seek administrative relief at all, or that they exhaust their administrative remedies if they choose to invoke them. The far more natural inference from this congressional silence is that age discrimination complainants, unlike Title VII complainants, need not wait any particular amount of time after filing their administrative complaints before going to court.

It is true that allowing complainants who invoke the administrative process to abandon it while it is pending would deprive the agency of the chance to correct its own errors, and would normally be considered an infringement of agency autonomy. This is not the normal way to conduct business, and reasonable minds could certainly devise a different relationship between the administrative and judicial avenues of relief for an age discrimination complaint. Here, however, the EEOC has concluded that age discrimination complainants may seek judicial relief while administrative procedures are pending.¹⁹ The EEOC's

employing agency has not reached a decision on the complaint, or after 180 days from the filing of an appeal with the EEOC, if the Commission has not reached a decision. 54 Fed. Reg. 45,763 (1989). The Notice of Proposed Rule Making explains that this regulation "address[es] the exhaustion of remedies problems raised by the decision in *Purtill v. Harris*" and similar cases. *Id.* at 45,750. Thus, the proposed regulations reflect the agency's conclusion that, in light of the judicial imposition of an exhaustion requirement, an employee should have some way of escaping from an overly extended administrative process—the regulations do not reflect an independent agency determination that an exhaustion requirement should be imposed.

¹⁹ Cf. *Weinberger v. Salfi*, 422 U.S. 749, 765-767 (1975) (exhaustion doctrine's purposes relating to agency autonomy are satisfied if agency believes case ready for judicial con-

regulations state that an employee's filing of a civil action will terminate the processing of any administrative complaint asserting the same claim. 29 C.F.R. 1613.513. This regulation demonstrates the Commission's conclusion that employees may file—and the court may consider—a civil age discrimination complaint before administrative procedures are completed. Otherwise, the termination of administrative review would deprive the complainant of any opportunity to obtain an adjudication on the merits, either administratively or judicially. That is clearly not what the regulation contemplates, and it has not been so interpreted by the EEOC. See *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989) (agency interpretation of own regulation is "controlling" unless it is "plainly erroneous or inconsistent with the regulation").

The Commission's regulations also provide that while its Title VII regulations will generally govern the processing of age discrimination complaints, Sections 1613.281 and 1613.282 shall not apply in that context. 29 C.F.R. 1613.514. Those Sections reflect the statutory right to file a civil action under Title VII at certain points in the administrative process.

sideration). *Salfi* counsels a court to accept an agency determination that the party before it has sufficiently exhausted administrative procedures. It follows that an agency's determination that no exhaustion requirement applies to its procedures should be equally conclusive: if courts nevertheless imposed an exhaustion requirement, the agency could simply adopt a policy of never challenging a party's failure to exhaust administrative remedies. Under *Salfi*, the agency's determination would be conclusive in each case. For all practical purposes, that result would be the same as accepting the agency's generalized determination that there is no exhaustion requirement.

There is no regulation providing the right to file a civil action under the ADEA, because that statutory right is independent of the administrative process.²⁰

Congress has entrusted the administration of the ADEA federal employment requirements to EEOC. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), EEOC's interpretation of those requirements—if reasonable and consistent with the statutory purposes—is entitled to judicial deference. Accord *Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990). The relevant purpose of the ADEA is to provide federal employees who complain of age discrimination with a forum in which to air their complaints. The Act provides, without any limitation other than the notice requirement of Section 633a(d), that any aggrieved person may file a civil action in district court. It is certainly reasonable for the agency to conclude that the Act imposes no exhaustion requirement. Furthermore, it is particularly consistent with the purpose of remedying age discrimination that complainants be given the option of proceeding directly to whatever forum they think likely to give them the swiftest relief. Accordingly, because the EEOC's interpretation of the Act is reasonable and consistent with the Act's purposes, that interpretation should be upheld under *Chevron*.

²⁰ At several points before the district court, petitioner's counsel stated that petitioner had "30 days from the time that all the appeals were exhausted" to file suit, and that he "filed within the 30 days allowed for filing a claim in District Court." App., *infra*, 1a. There is, however, no such 30-day requirement; such a requirement is applicable to Title VII claims, but it is expressly inapplicable under the ADEA. See 29 C.F.R. 1613.514.

III. PETITIONER SATISFIED ALL TIMELINESS REQUIREMENTS FOR BRINGING HIS CIVIL ACTION

There are two potentially relevant time limits for bringing a civil action pursuant to 29 U.S.C. 633a (c): first, the time limit for giving notice to the EEOC of an intent to bring a civil action; second, the statute of limitations.

Petitioner clearly satisfied the first requirement. As the court of appeals recognized, he gave notice of the intent to sue within 180 days of the allegedly discriminatory action, as Section 633a(d) requires.²¹ He then waited "not less than thirty days" before filing his civil action, as that Section also requires. The court of appeals may, like the district court (Pet. App. A3), have misread this statutory requirement as requiring that suit be filed *within* 30 days of the notice, instead of *after* 30 days from the date of the notice. Pet. App. A7; see also n.20 *supra*. Since petitioner did not contend in the court of appeals that he had satisfied the direct review provisions of the statute, the opinion is very cryptic on this point. In any event, the statute is clear.

The statute requires only that the employee give the Commission at least 30 days' notice of an intent to file a civil action; it does not expressly place any limitation on the time within which federal employees may seek judicial relief for complaints of age discrimination. The decisions of this Court indicate that where a federal statute fails to place any time limitation on the civil action it authorizes, the courts will

²¹ The EEOC has consistently accepted notices given to the employing agency as sufficient compliance with the statutory notice requirement. See Management Directive EEO-MD 107, Ch. 12, at 12-2 and 12-3.

assume that Congress intended that courts would impose an appropriate limitation, borrowed either from a state statute or from an analogous federal statute. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146-147 (1987). It is unnecessary in this case to determine what the time limit is for the bringing of civil actions authorized by 29 U.S.C. 633a(c).²² Petitioner filed his civil action one year and six days following the allegedly discriminatory event.²³ That is well within whatever statute of limitations might apply to the action.²⁴

²² The proposed EEOC regulation (see note 18, *supra*) adopts the two or three year (depending on whether the discriminatory action was wilful) statute of limitations applicable to private sector ADEA law suits. 54 Fed. Reg. 45,750, 45,763 (1989). In contrast, the "Notice Of Appellant's Right To File A Civil Action" sent to petitioner states that "you MAY have up to six years after the right of action first accrued in which to file a civil action," referring to the general statute of limitations for civil actions against the government, 28 U.S.C. 2401. *Stevens v. Department of the Treasury*, No. 88-2012 (E.E.O.C. Mar. 30, 1988) slip op. R-1.

²³ Petitioner assumes (Pet. Br. 11) that the relevant time is that between the filing of the notice of intent to sue and the filing of the suit. Statutes of limitation typically limit the time from the claimed injury to the commencement of the lawsuit.

²⁴ See, e.g., *Coleman v. Nolan*, 49 Fair Empl. Prac. (BNA) 385, 387 (S.D.N.Y. 1988) (claim untimely under either 3-year limitations period of 42 U.S.C. 1981 or 2-3 year private sector ADEA limitations period); *Marks v. Turnage*, 46 Fair Empl. Prac. Cas. (BNA) at 382-384 (6-year limitations period applicable to public sector ADEA claims); *Wiersema v. TVA*, 41 Fair Empl. Prac. (BNA) 1588, 1589 (E.D. Tenn. 1986) (2-3 year limitations period for private sector ADEA claims applicable to public sector claims).

CONCLUSION

The petition should be dismissed as improvidently granted. If the Court concludes, contrary to our submission, that the issue petitioner presents is ripe for review, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1991

APPENDIX

MARCH 29, 1989 TRANSCRIPT

MR. MCKEE: Your Honor, I believe that the evidence does show that Mr. Stevens did begin to attempt to go through the process to get a valid claim filed, although he was not at any given point in time assured, or did not know that was in fact the reason for the transfer, in addition or from his position as a revenue officer trainee. In addition, I believe the law is, and the Age Discrimination in Employment Act, different than in other civil rights actions in that a party, a complainant could forego the EEO complaint route completely, the administrative route. I believe that what they are suggesting is that he must complete the administrative route before he can bring suit in this Court. I don't believe that that is the law. I think the law is that as long as notice is provided within a 180-day period, that he can bring suit at anytime by giving 30 days notice to the parties involved. I think he did in fact do that within the 180 days, that the procedure, until the time of the appeal, or the denial of his appeal by the review board, which is part of the Government's record in terms of its exhibits, that he had 30 days from that time period and he would have been effectively estopped from filing it until, or while the appeals people had jurisdiction over his claim. So, I believe that the proper posture of the claim is that he had 180 days to say something, and 30 days from the time that [81] all the appeals were exhausted, which did not occur until he received notice in April of 1987 that his appeal was rejected. Once rejected, he then had 30 days in which to file this action. And I believe that is the proper posture of the case, and is the proper posture of the law.

THE COURT: Are you telling me that his administrative appeals with the IRS ended in April, 1987?

MR. McKEE: That is correct.

THE COURT: They told him, he appealed, went that route. And in April, those appeals came to an end.

MR. McKEE: That is correct.

THE COURT: And the only place he had then to go was, you are saying, the Court, or someplace to let them know?

MR. McKEE: Within 30 days.

THE COURT: When was this suit filed, and what action was taken between April and September of '87?

MR. McKEE: Of '87?

THE COURT: Yes.

MR. McKEE: Well, between April and September of '87, he began trying to redress the wrongs he felt had been done to him. He went to the Union.

THE COURT: That doesn't give me jurisdiction. Go head.

MR. McKEE: I understand. He sought counseling. I [82] think the evidence does show that prior to the EEO counselor actually granting him an interview, that he made several calls and attempted to set up appointments with EEO. It was, they were the ones that didn't grant him the appointment. When he did in fact get an appointment, he went through the entire process. He went through the process on the local level, went through the process of appeal. That appeal was decided at the regional—at the highest level of appeals in Washington, I believe. And that opinion was sent back to him, decided in March, March 30th. And then the decision got to him on

April the 4th of 1988. He thereupon filed within the 30 days allowed for filing a claim in District Court.

THE COURT: Okay. Do you care to respond to that?

MS. SMITH: I'm not sure. For one thing, I am not sure what the relevance. We are not debating that he filed a lawsuit timely after the appeals process was exhausted. But the whole point of the decision of the EEOC was that his complaint was not timely with the administrative agency. I am not sure whether the documentation is, but they, I don't know, they are saying he attempted to talk to a counselor, but I don't know that date. And they haven't really—they say, or he—there was a timely approach to counseling, but where is the evidence of that date?

THE COURT: Well, I am going to take the matter along with the rest of the case at this time. I will just [83] take the matter under advisement. Your motion is timely made. Thank you.

* * * * *

PET. C.A. BRIEF

Argument

In reaching its decision the courts relied on 29 C.F.R. § 1613.214(a). Appellant asserts that the appropriate analysis for jurisdiction of this cause should be based on 29 C.F.R. 1626.1 et seq.

29 S.F.R. 1626.7(a) states, "Charges will not be rejected as untimely provided that they are not barred by the statute of limitations as stated in Sec 6 of the Portal to Portal Act of 1947."

The relevant provision of the Portal to Portal Act is found at 29 U.S.C. § 255. It states in relevant part,

"Any action commenced on or after the date of the enactment of this act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938. . .

(a) may be commenced within 2 years after the cause of action accrued."

Since the provisions of 29 C.F.R. §§ 1626.1 et seq. were specifically written to cover complaints and charges filed pursuant to the Age Discrimination In Employment Act, these provisions clearly control the Commission's actions as they relate to such complaints and/or charges based on age discrimination. Therefore the commission's action, in rejecting Mr. Stevens complaint on the basis that it was untimely, is erroneous.

The courts opinion relies on the above-stated Commission finding that, in order to be timely filed, Mr. Stevens complaint needed to have been filed within 30 days of it discovery.

Further, at the time of the court's hearing in this matter, the Congress of United States had enacted the Age Discrimination Claims Systems Act of 1988. That statute provides for the extension of the statute of limitations for civil actions to be brought under the Age Discrimination in Employment Act of 1967. This new statute provides that an aggrieved person under the Act has 540 days beginning on the date of the enactment of the Act (April 1988) to file a civil action if a charge has been timely filed under the Age Discrimination in Employment Act after December 31, 1983. Since, even with a reading most unfavorable to the Appellant, the Appellant clearly filed a charge with the Commission within the time period allowed by 29 C.F.R. 1626.7, the trial court clearly had and continues to have the jurisdiction to decide the merits of this case.

In The
Supreme Court of the United States
October Term, 1990

CHARLES Z. STEVENS, III,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF THE TREASURY,
NICHOLAS F. BRADY, SECRETARY, U.S.
DEPARTMENT OF THE TREASURY,

Respondents.

On Writ of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
I. This Court Should Review The Questions Pre- sented Because They Raise An Important And Recurring Issue Of Federal Law On Which The Courts Of Appeals Are Divided	3
II. Because The Court Of Appeals Decided The Ques- tions Of Law Presented In The Petition, Prudential Considerations Do Not Bar Review	5
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Bornholdt v. Brady</i> , 869 F.2d 57 (2nd Cir. 1989).....	3
<i>Carlson v. Green</i> , 446 U.S. 14 (1980).....	4
<i>Castro v. U.S.</i> , 775 F.2d 399 (1st Cir. 1985).....	2, 3
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	2
<i>City of Canton v. Harris</i> , 489 U.S. 378 (1989).....	3
<i>Dept. of Treasury v. F.L.R.A.</i> , 494 U.S. ___, 110 S.Ct. 1623 (1990).....	5
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	5
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974)	5
<i>Kennedy v. Whitehurst</i> , 690 F.2d 951 (D.C. Cir. 1982)	3
<i>Langford v. United States Army Corps of Engineers</i> , 839 F.2d 1192 (6th Cir. 1988).....	3
<i>In Re Matter of Texas Mortgage Services Corp.</i> , 761 F.2d 1068 (5th Cir. 1985).....	6
<i>McGinty v. United States Dept. of the Army</i> , 900 F.2d 1114 (7th Cir. 1990).....	3
<i>McKinney v. Dole</i> , 765 F.2d 1129 (D.C. Cir. 1985).....	3
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	9
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982)	9
<i>Ocala Star-Banner Co. v. Damron</i> , 401 U.S. 295 (1971).....	5
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985).....	3

TABLE OF AUTHORITIES - Continued

	Page
<i>Purtill v. Harris</i> , 658 F.2d 134 (3rd Cir. 1981), cert. den., 462 U.S. 1131 (1983).....	3
<i>Raley v. Ohio</i> , 360 U.S. 423 (1959)	5
<i>Ray v. Nimmo</i> , 704 F.2d 1480 (11th Cir. 1983)	3
<i>St. Louis v. Praprotnik</i> , 485 U.S. 112 (1988).....	3
<i>United Paperworkers Int'l Union v. Champion Int'l</i> , 908 F.2d 1252 (5th Cir. 1990).....	6
<i>White v. Frank</i> , 895 F.2d 243 (5th Cir. 1990), cert. den., ___ U.S. ___, 111 S.Ct. 232 (1990)	3
<i>Wrenn v. Secretary</i> , 918 F.2d 1073 (2nd Cir. 1990).....	3
STATUTES:	
Age Discrimination in Employment Act of 1967 § 15, 29 U.S.C. § 633a	1, 2, 4, 7, 8
Title VII of the Civil Rights Act of 1964 § 717, 42 U.S.C. § 2000e-16.....	9

No. 89-1821

In The

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October Term, 1990

CHARLES Z. STEVENS, III,

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vs.

UNITED STATES DEPARTMENT OF THE TREASURY,
NICHOLAS F. BRADY, SECRETARY, U.S.
DEPARTMENT OF THE TREASURY,

Respondents.

On Writ of Certiorari To The United States Court
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REPLY BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Respondent has conceded that the court of appeals erred when it denied Petitioner Stevens a federal judicial forum to pursue a claim under the Age Discrimination in Employment Act (ADEA). As respondent correctly notes, § 15 of the ADEA, 29 U.S.C. § 633a, does not require victims of discrimination to exhaust administrative remedies before seeking judicial relief. Respondent agrees with petitioner that nothing in the text or legislative history supports imposing an exhaustion requirement upon plaintiffs seeking to vindicate ADEA claims against

the federal government. Respondent also notes that the Equal Employment Opportunity Commission, which administers ADEA, has concluded that the Act does not impose an exhaustion requirement, *see* Brief for respondent at 27-28, and correctly states that since that interpretation is fully consistent with ADEA's purpose of providing federal employees with a judicial forum for their age discrimination complaints, it is therefore binding on this Court. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Respondent nevertheless urges this Court to dismiss the writ of certiorari as improvidently granted. This argument must be rejected. As will be demonstrated, dismissal would be entirely inappropriate for two reasons. First, dismissal would be fundamentally inconsistent with this Court's duty to ensure the correct and uniform application of federal law because a clear conflict in the circuits, on a recurring issue of substantial importance, would be left unresolved.¹ Second, there exists no bar – prudential or otherwise – to this Court's consideration of the substantive issues presented in the petition because those issues were *decided* by the court of appeals.

¹ Petitioner raises two issues on certiorari. First, he asserts that reading § 15(d)'s mandate that federal employees may file their ADEA civil actions "not less than" thirty days after giving notice of intent to do so to mean that such suits are untimely if they are not filed "within" thirty days is a clear misreading of the statutory language. Though there is not, technically, a split in the circuits on this issue, at least two courts of appeals other than the one in the instant case have made this same misreading, *Castro v. United States*, 775 F.2d

(Continued on following page)

ARGUMENT

I. This Court Should Review The Questions Presented Because They Raise An Important And Recurring Issue Of Federal Law On Which The Courts Of Appeals Are Divided.

Dismissal of the writ in this case would be inappropriate for several reasons:

First, this Court has already evaluated, and implicitly rejected, respondent's arguments against review in this case. "The 'decision to grant certiorari represents a commitment of scarce resources with a view to deciding the merits . . . of the questions presented in the petition.'" *St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988); *quoting Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *see also City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1202 (1989). In the present case, the decision has been made and the

(Continued from previous page)

399, 403 (1st Cir. 1985), *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985) and remedial action by this Court is thus warranted to prevent further error. Petitioner's second question pertains to whether § 15(b) administrative remedies must be timely exhausted by federal ADEA claimants as a precondition to suit. It is this issue that divides the circuits from each other, compare *Langford v. United States Army Corps of Eng'rs*, 839 F.2d 1192 (6th Cir. 1988), *Kennedy v. Whitehurst*, 690 F.2d 951 (D.C. Cir. 1982) and *Ray v. Nimmo*, 704 F.2d 1480 (11th Cir. 1983) (supporting the no exhaustion position urged by both parties before this Court) with *Purtill v. Harris*, 658 F.2d 134 (3rd Cir. 1981), *cert. den.*, 462 U.S. 1131 (1983), *McGinty v. United States Dept. of the Army*, 900 F.2d 1114 (7th Cir. 1990), *Castro v. United States*, 775 F.2d 399 and *White v. Frank*, 895 F.2d 243 (5th Cir. 1990), *cert. den.*, 111 S.Ct. 232 (1990), as well as internally, compare *Wrenn v. Secretary*, 918 F.2d 1073 (2nd Cir. 1990) with *Bornholdt v. Brady*, 869 F.2d 57 (2nd Cir. 1989).

resources of the Court and the parties have been committed.

Second, there is no dispute that this case presents a recurring issue of national importance on which the courts of appeals are divided. *See* Resp. Br. at 17 (conceding existence of conflict in the circuits). The issue potentially affects *every* person with an age discrimination complaint against the federal government. Plaintiffs in different circuits are presently subject to different rules respecting exhaustion of administrative remedies. In urging that the petition should nonetheless be dismissed, respondent in effect asks this Court to ignore its primary responsibility to ensure the correct and uniform application of federal law, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

Third, the ruling below was – as all concede – clearly wrong and petitioner was thus deprived of his right to bring an age discrimination suit in federal court. It would be manifestly unjust to leave this error uncorrected, and deny petitioner the federal judicial forum Congress intended.

For these reasons, the case should proceed. This Court should enter a judgment in favor of petitioner on the merits, thereby correcting the error below and clarifying the proper rule respecting exhaustion of remedies by federal employees under the Age Discrimination in Employment Act.

II. Because The Court Of Appeals Decided The Questions Of Law Presented In The Petition, Prudential Considerations Do Not Bar Review.

Respondent urges dismissal because “this case does not present exceptional circumstances justifying a departure” from this Court’s practice of refusing to consider issues not preserved below. *See* Resp. Br. at 11. That assertion rests on a faulty premise. As a prudential matter, this Court generally declines review when the question presented in a petition for certiorari “was not raised or considered in the Court of Appeals.” *Department of Treasury v. F.L.R.A.*, 110 S.Ct. 1623, 1630 (1990). The issues presented in the petition for certiorari in this case, however, *were* decided by the court of appeals. Accordingly, review is entirely proper without any showing of “exceptional circumstances.”

Respondent does not claim that the court of appeals failed to decide the issues in the petition. To the contrary, respondent repeatedly concedes – as it must – that the issues were decided. *See, e.g.*, Resp. Br. at 12. That concession disposes of respondent’s argument. This Court has consistently made clear that “there can be no question as to the proper presentation of a federal claim” when the lower court has passed on the merits of that claim. *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959); *see also Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Franks v. Delaware*,

438 U.S. 154, 161-62 (1978).² Once the court below has reached the merits of a federal question, whether that question was fully raised and briefed becomes irrelevant.³ The sorts of prudential considerations raised by respondent simply do not come to bear.

Even if this Court were to evaluate whether prudential considerations suggest dismissal – and it should not – respondent has not made the case for dismissal. Respondent does not contest that: petitioner raised both the § 15(d) timing and § 15(b) exhaustion issues in the district court;⁴ the district court decided the issue adversely to

² This principle applies even in the context of review of state court decisions, where principles of comity and federalism weigh strongly against review unless an issue has been properly preserved in the state court.

³ Respondent suggests that the Fifth Circuit's internal rules are at variance with this. They are not. Waiver of an issue for failure to brief it is a prudential rule in the Fifth Circuit, not a jurisdictional one, and does not prevent that court's reaching unargued issues if it chooses, see *United Paperworkers Int'l Union v. Champion Int'l*, 908 F.2d 1252, 1255 (5th Cir. 1990). Indeed, one of the purposes of this rule is to protect parties from decisions based on issues they have not had an opportunity to argue *In Re Matter of Texas Mortgage Services Corp.*, 761 F.2d 1068, 1074 (5th Cir. 1985), something not at issue here, since the respondent fully argued these issues. Resp. CA Br. 6-7.

⁴ [Record references are to the separately bound and paginated transcript [Rtr.] or pleadings [Rpl.] volumes and to the Joint Appendix [J.A.]. Exhibits are referred to by their district court exhibit number [G.Ex.] or [P.Ex.]].

Petitioner's § 15(d) notice of intent to sue was attached as an exhibit to his complaint [J.A. 15] and offered into evidence

(Continued on following page)

petitioner on the basis of a clear error of law;⁵ the question presented to the court of appeals specifically raised

(Continued from previous page)

by stipulation [Rtr. 12, G.Ex. 4, p.65]. Petitioner also testified concerning his attempts to follow the § 15(d) process set forth in his personnel manual [Rtr. 18-19; 22]. In response to respondent's Rule 41(b) dismissal motion, petitioner specifically cited the distinction between the ADEA and other employment discrimination statutes on the exhaustion issue and urged denial of the motion on the basis of his timely filing of a § 15(d) notice of intent to sue within 180 days of the allegedly discriminatory act [Rtr. 80, Lines 8-18; J.A. 22; Resp. Br. 1a]. Petitioner also argued, alternatively, that even if exhaustion were required, he had done so by allowing his untimely administrative efforts to run their course before he filed suit. [Rtr. 80, Lines 18-21; Resp. Br. 1a].

⁵ In its Order and Memorandum Opinion, the District Court dismissed petitioner's case on the basis of what it referred to as the "jurisdictional issue." Pet. App. A-1. Adopting nearly verbatim respondent's proposed conclusions of law [Rpl. 14-15] the court expressly rejected petitioner's contention that he preserved his right to proceed pursuant to the § 15(d) bypass route, holding instead that § 15(d) permitted only suits initiated "no later than 180 days from the unlawful action" where the claimant has notified the EEOC "within 30 days prior to commencing suit." Pet. App. A1-3. The court further held that under § 15(b), an unsatisfied employee may bring suit "only after exhausting his administrative remedies." *Id.* Because petitioner had defaulted on time requirements in both the §§ 15(b) and 15(d) processes, the court concluded, he could not proceed with his claim in federal court. Pet. App. A-4. As both parties before this Court now agree, the district court's ruling rested on a plainly erroneous reading of the relevant law as it pertains both to the deadline for suit filing under § 15(d) and to exhaustion of remedies under § 15(b).

the issues presently before this Court;⁶ respondent specifically addressed the merits of these questions in its brief to the court of appeals;⁷ and the court of appeals decided both issues on the merits.⁸ At bottom, therefore, respondent urges this Court to leave standing a clearly

⁶ The question presented to the Court of Appeals read as follows:

"If an aggrieved party fails to file an administrative age discrimination complaint in the time frame of the general administrative provision of the Equal Employment Opportunity Commission, does such failure deprive a Federal District Court of jurisdiction to hear a civil action filed under the Age Discrimination in Employment Act where a charge has been timely filed thereunder."

Pet. C.A. Br. 1-2.

⁷ Respondent specifically argued in the court of appeals, as it had in the district court, that under § 15(b) petitioner was required to "properly exhaust his administrative remedies like employees alleging other types of discrimination" and that § 15(d) required filing suit "within" thirty days of the notice of intent to do so, Resp. C.A. Br. at 6-7. This argument is reprinted in its entirety as an appendix to this brief.

⁸ The court of appeals' misreading of § 15(d) to mean that suits must be filed "within" thirty days of notice of intent to do so is the basis on which it affirmed the district court's dismissal of the action despite its conclusion that petitioner had timely filed his § 15(d) notice of intent to sue, Pet. App. A-7. The court of appeals also expressly ruled that petitioner's § 15(b) administrative remedies were untimely and could therefore not serve as the predicate for suit, Pet. App. A-6, thereby affirming the district court's exhaustion ruling as well.

erroneous ruling of federal law, and leave unresolved a split in the circuits on an important and recurring issue, for the sole reason that the petitioner did not address the issue adequately in the argument section of his brief to the court of appeals. This claim elevates form over substance to an extreme degree.⁹

Respondent's effort to blame petitioner for the court of appeals' error is particularly inappropriate. In determining that petitioner's case should be dismissed for failure to exhaust administrative remedies, the court did no more than what respondent had specifically urged it to do. Indeed, as it had in the district court, respondent specifically argued to the court of appeals that § 15(d) requires a notice of intent to sue to be filed "within thirty days prior to commencing suit," Resp. C.A. Br. 6, and that § 15(b) remedies must be timely invoked and exhausted in the same manner as administrative remedies under § 717 of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16, Resp. C.A. Br. 7, positions respondent now concedes were clearly erroneous. It is commendable that respondent has acknowledged in this Court its own error in inviting the court of appeals' rulings. However, having urged the Court below to make those erroneous rulings, respondent cannot now be permitted to argue that this

⁹ In any event, the question presented is purely legal, and does not depend in any way on the particular circumstances of this case. This Court has repeatedly held that "purely legal questions" can be appropriately reviewed even if those questions were not properly presented or decided in the court of appeals. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

Court should leave the errors uncorrected because the issues received inadequate consideration below.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

RESP. C.A. BRIEF

V. ARGUMENT

- A. When A Federal Employee Pursues An Administrative Complaint Age Discrimination Against His Employer, He Must Meet All Administrative Requirements.

Mr. Stevens brought his claim under the ADEA. 29 U.S.C. § 633a. A federal employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA. He may proceed directly to Federal Court provided that he initiates the civil action no later than 180 days from the unlawful action and that a Notice of Intent to Sue is given to the Equal Employment Opportunity Commission within thirty days prior to commencing suit. 29 U.S.C. § 633a(d); *Ray v. Nimmo*, 704 F.2d 1480, 1483 (11th Cir. 1983); *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985).

In lieu of filing directly with the Court, an employee may file an administrative complaint with the employing federal agency pursuant to regulations established by the Equal Employment Opportunity Commission pursuant to its authority under the ADEA. 29 U.S.C. § 633a(b). The EEOC has promulgated regulations pursuant to this statutory authority and they are found at 29 C.F.R. § 1613.501, et seq. If an employee files an administrative claim with his agency, the employee must properly exhaust his administrative remedies like employees alleging other types of discrimination. 29 U.S.C. § 633a(b); 29 C.F.R. § 1613.511; *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Purtill v. Harris*, 658 F.2d 134, 138, (3rd Cir.

1981), cert. denied 462 U.S. 1131. Suits arising under the ADEA are reviewed under the same standards as suits brought under Title VII of the Civil Rights Act of 1964 as amended. *Bohrer v. Hanes Corporation*, 715 F.2d 213, 218 (5th Cir. 1983).

It is well established that a federal employee must timely exhaust any administrative remedies available to him before he can bring suit. *Brown v. General Service Administration*, 425 U.S. 820, 832 (1976); *Hoffman v. Boeing*, 596 F.2d 683, 685 (5th Cir. 1979); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985). In this case there is no doubt that Mr. Stevens did not contact an EEO counselor within thirty days of his belief that his reassignment was caused by age discrimination. Judge Bunton's determination is well supported in the record and appellant is not contesting the factual determinations of Judge Bunton. Therefore, Judge Bunton properly dismissed Mr. Stevens cause of action because Mr. Stevens did not meet the administrative requirements.

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